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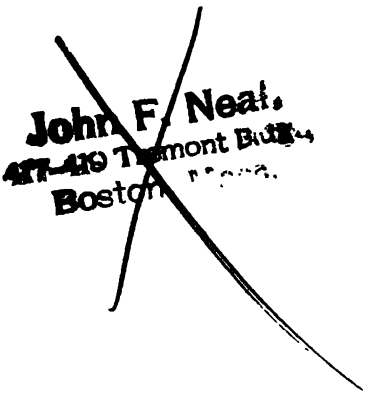

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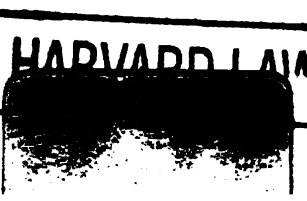

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MASSACHUSETTS REPORTS

187

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

NOVEMBER 1904 — APRIL 1905

HENRY WALTON SWIFT

REPORTER

BOSTON
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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. JOHN LATHROP.

HON. JAMES MADISON BARKER.

HON. JOHN WILKES HAMMOND.

HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

ATTORNEY GENERAL.

HON. HERBERT PARKER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

HENRY GILLETTE *vs.* GENERAL ELECTRIC COMPANY.

Bristol. October 24, 1904. — November 21, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

If a workman, in crossing the end of a pit at the place of his employment instead of going around it, chooses to step upon a timber plainly inserted as a brace to hold a piece of machinery in place and not intended as a bridge, he does so at his own risk, and it does not matter how often the same risk has been taken by himself and others, including the superintendent in charge of the work.

TORT for personal injuries sustained while in the employ of the defendant as a laborer helping to install a large electric generator in the power house of the Old Colony Street Railway Company in Fall River, through the alleged negligence of a superintendent of the defendant. Writ dated September 16, 1902.

At the trial in the Superior Court *DeCourcy*, J. at the close of the evidence ruled that there was no evidence which would warrant a verdict for the plaintiff, and ordered a verdict for the defendant. At the request of the parties, the judge reported the case for determination by this court, it being agreed that if

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the ruling was correct the verdict for the defendant was to stand; otherwise, the plaintiff was to be entitled to damages in a sum agreed upon by the parties.

F. A. Pease, for the plaintiff.

R. P. Borden, for the defendant.

BARKER, J. The work in hand was the installation by the defendant of an electrical generator in the power house of a railway company. The undertaking was in its nature temporary. The building with its entrances and floors did not belong to the defendant and was to be used by it only while it was installing the machinery in the power house. Before the plaintiff who was a common workman began his employment there a pit had been constructed in and below the floor to receive the generator and the fly wheel of the engine which was to drive it. In one part of the pit the lower half of the field piece of the generator had been placed. This half was a metal structure weighing sixteen tons or more, and portions of it rose three or four feet above the level of the floor. Tackle used to bring into place heavy parts of the machinery to be installed had been hitched to one end of that half of the field piece which had been put in the pit. To prevent the strain of the tackle from moving the field piece in the pit a brace had been placed between it and the opposite side wall of the pit, about two feet from the end of the pit. This brace was a stick of lumber three and one half feet in length six inches wide and five inches thick supported at the end next the field piece by an iron flange of the field piece, and at the other end by the friction of the end of the brace against the perpendicular side wall of the pit, the brace having been put in place by resting one end on the flange and driving down the other end with a sledge. All this had been done before the plaintiff had any connection with the work. At the end of the brace which was next the field piece there rose perpendicularly above the level of the floor a part of the field piece so that the brace could not be used for passage directly across the pit, but by stepping from the floor at the end on one side of the pit to the brace and then to the floor one wishing to get from one side to the other could cross a corner of the pit and save a little distance. The part of the pit unoccupied by the field piece was three and one half feet wide and about twenty feet long, and

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was open except for the brace. In the prosecution of the work many pieces of timber were used for blocking, and were moved from time to time as the work demanded, and when not in use were left on the floor of the room making it difficult to get around. The pit was near one corner of the room and the end of the pit near which was the brace was near the door of the room.

The plaintiff had worked for a week in the place described, as a general laborer, moving blocking and doing other things. During this time as he testified he had seen other workmen and the superintendent frequently use the brace by stepping on it in order to cross the pit, and he testified that he thought the brace was put there to go across. Having occasion to go to a workman who was in the pit, the plaintiff instead of passing around the end of the pit, stepped upon the brace and so crossed. Immediately thereafter having occasion to go to the side of the pit from which he first started, in attempting to return he again stepped upon the brace, when it gave way causing him to fall into the pit. He sues under the employers' liability act to recover for injuries occasioned by the fall, contending that he was hurt by reason of the negligence of the superintendent in charge, in not having the brace supported at the end next the wall and in allowing it to be used as a bridge for passage without warning that one end was unsupported.

The circumstances stated distinguish the present case from the decisions on which the plaintiff relies. Here it is plain that the stick of timber which gave way was designed only as a brace. There was no occasion for a bridge across the pit at a point only two feet from the end of the pit, and the rising of the part of the field piece in the middle of the pit's width at one end of the brace showed so plainly that the brace was not a bridge that any one who undertook to step upon it must be taken to have known that it was not put there as a bridge or way. If the plaintiff thought it was put there to go across upon he was negligent in his examination of the place where he was set to work and in his deductions from what he saw, and so in his use of the brace as a bridge.

In *Dolphin* v. *Plumley*, 167 Mass. 167, the saw mill was in permanent use, and the path which the plaintiff took was if not

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the only one, that which upon the evidence was ordinarily used to go from one end of the mill to the other. So in *Hanlon* v. *Thompson*, 167 Mass. 190, the injury was caused by the rottenness of a floor intended to be permanent, and over which the evidence tended to show that the men were expected to pass. In *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93, the hoist was designed to support and to raise and lower heavy articles with safety and there was not only evidence tending to show that the workmen commonly but continually used it, and that it was the only means of access to and from their work which their own employers had furnished, the only other means being ladders furnished by other contractors upon the same building, and also that both of the defendant's superintendents had told their workmen to ride on the hoist in place of using the ladders, because it saved time. In *Connors* v. *Merchants Manuf. Co.* 184 Mass. 466, the trap door when closed formed part of the mill floor, but even this constituted no invitation to use it for passage, another way being provided. In the present case the floor of the room gave access to every portion of the premises which the plaintiff's work required him to visit. The floor itself was in order, and if the pieces of blocking which encumbered it were in the plaintiff's way he could remove them from the place where they had been left by himself or his fellow workmen, or he could step over them. When he chose to step upon a brace plainly designed as a brace and not as a bridge, he did so at his own risk no matter how frequently the same risk had been taken by himself or others.

Verdict for the defendant to stand.

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WILLIAM H. PRATT *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 25, 1904. — November 21, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence. Railroad.

One who is employed by a shipper to assist in putting merchandise into a freight car on a spur track of a railroad, and in pushing the freight car to the place of loading is struck and injured by another car started down a grade by a high wind, the grade not being noticeable and not known to him, can be found to be in the exercise of due care.

To leave an empty freight car with the brakes not set at the top of a down grade on a spur track, on which it is the practice for shippers to move cars by hand, can be found to be negligence on the part of a railroad company, for which it is liable to the employee of a shipper who when pushing another car into the place for loading is struck by the car first mentioned started down the grade by a high wind; and in such a case it is no excuse for the railroad company that the car with the brakes not set was held in place on the grade by the car below it, which had its brakes set and which was moved by the employee of the shipper after loosening its brakes, because such a moving of the supporting car ought to have been foreseen.

TORT for personal injuries from being struck by an empty freight car of the defendant. Writ dated February 9, 1903.

In the Superior Court the case was tried before *Hitchcock*, J. The following statement of the case giving in substance the material evidence is taken from the opinion of the court:

The plaintiff was employed by one Porter, a shipper of merchandise, to assist in loading box boards into a freight car on a spur track of the defendant, at Tremont in this Commonwealth. This spur track was used for loading freight cars, and abutted upon an open space belonging to the defendant, devoted by it to the deposit of goods to be loaded in such cars. On saying that he wished to move the two cars which were to be loaded to the place where the box boards were, Porter was furnished by the defendant with a bar with which to move the two cars. While the plaintiff, together with Porter and two other of Porter's employees, was moving the car south, to be placed where the boards were, another car came down upon the plaintiff without warning. It first was seen by one of the other employees, who

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called to the plaintiff, but the car struck the plaintiff before he could get out of its way, while he was walking between the rails pushing against the bunter of the car which was being moved. The car which ran the plaintiff down was standing by itself, six to ten feet north of the car which the plaintiff was in the act of moving, before the moving of that car was begun.

It was in evidence that it was the practice for shippers to move cars to a place on this spur track convenient for loading the goods to be shipped. It also was in evidence that there was a grade in this spur track running toward the south; that it was a grade which no one would be likely to see unless looking for it; and that if the brakes were set on a freight car it could not be moved even by an iron bar down this grade. At the time of the accident there was a high wind from the north, and no engine, no employee of the defendant, or any one else, was near the car which ran the plaintiff down after it was left on the spur track earlier on the same day.

The presiding judge directed the jury to return a verdict for the defendant, and the case is here on an exception to that ruling.

W. B. Perry, L. W. Jenney & G. H. Potter, for the plaintiff.

F. S. Hall & C. C. Hagerty, for the defendant.

LORING, J. [After the above statement of the case.] The defendant seeks to support the ruling on two grounds: first, that there was no evidence of due care on the part of the plaintiff, and second, that the cause of the accident was on the evidence a matter of conjecture and no negligence on the defendant's part was shown.

But we are of opinion that these contentions cannot be maintained.

1. The place in question was not a railroad yard where cars were continually going back and forth. It was a single spur track, leading off the main line, devoted to loading freight cars, at what appears to be a small country station of the defendant's railroad, and at the time of the accident there was neither any employee of the railroad company nor any other person in the neighborhood. Under these circumstances the plaintiff was not as matter of law lacking in due care in walking between the rails while pushing the car in question to the place where it was

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to be loaded at the invitation of the defendant. There was evidence that the plaintiff did not know that there was a grade in the track. For this reason the case does not come within such cases as *Jean* v. *Boston & Maine Railroad*, 181 Mass. 197; *Judge* v. *Elkins*, 183 Mass. 229; *Dyer* v. *Fitchburg Railroad*, 170 Mass. 148; *Dolphin* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 509; and also is to be distinguished from *Martyn* v. *New York & Boston Despatch Express Co.* 176 Mass. 401.

2. We are of opinion that the jury were warranted in inferring that the car which was left without the brake being set and which ran down upon the plaintiff was put in motion down the grade by the high wind which then was blowing. The case comes within such cases as *Cox* v. *Central Vermont Railroad*, 170 Mass. 129, and not within such cases as *Kendall* v. *Boston*, 118 Mass. 234, and *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572. We also are of opinion that to leave a car with the brakes not set, at the top of a down grade on a spur track on which it is the practice for shippers to move cars by hand, is an act of negligence. The only doubt we have had is this: The plaintiff testified that the brakes were set on the first car which Porter and his employees moved south on this spur track, that there were no brakes set on the second car brought down by them, and that Porter and his men let off the brakes on the first car when they brought it down. But if it be assumed that the setting of the brakes on the first car next to the grade was a sufficient protection against all the cars behind it running down the grade, the defendant knew that there was a grade at this point and it also knew the practice then existing for the local agent to leave it to shippers to move the cars to the desired place, and knowing this it was negligent to leave this car at the top of the grade with the brakes not set, as against a shipper or the employee of a shipper who, from ignorance of the existence of the grade, might move the first car and thus be exposed to the danger from which the plaintiff suffered.

Exceptions sustained.

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LYDIA J. FERGUSON *vs.* UNION MUTUAL LIFE INSURANCE COMPANY.

Hampden. September 27, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Contract, Construction. *Insurance, Life.*

In the construction of an instrument in writing clauses should not be construed as repugnant if by any reasonable interpretation they can be reconciled so as to give force and effect to each.

A policy of life insurance, declared in its first paragraph to be a "non-forfeiture" policy, contained a provision "that after two or more of said annual premiums have been fully paid, this policy becomes a paid up, non-forfeiture policy, for an amount equal to the sum of one tenth of that hereby insured for each and every premium which shall have been so paid; requiring no further payments of premiums." The policy also contained a provision and condition "that if the amount of any annual premium herein provided for is not fully paid, with the interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void, and wholly forfeited." *Held*, that properly construed these two provisions were not in conflict; that, after the payment of two premiums the right to paid up insurance became vested, and if from a failure to pay a subsequent premium the general policy lapsed, there would remain a paid up non-forfeiture policy for two tenths of the amount named, and so long as the annual premium continued to be paid, each year would add one tenth more to the amount of insurance secured.

A provision for forfeiture in a policy of life insurance, being inserted for the benefit of the insurer, is not to be extended by implication, and if it is susceptible of more than one meaning that which is most favorable to the insured should be adopted.

CONTRACT on a policy issued by a life insurance company, organized under the laws of the State of Maine, upon the life of one George D. Ferguson, late husband of the plaintiff. Writ dated May 15, 1903.

In the Superior Court the case was heard upon the pleadings and an agreed statement of facts by *White*, J., without a jury. The judge refused to rule as a matter of law that upon all the evidence the plaintiff could not recover. He found that the plaintiff's husband, under the paid up non-forfeiture clause of the policy set out in the declaration, had fully paid six consecutive annual premiums within the meaning and requirements of the policy, and that the plaintiff was entitled to recover in this ac-

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tion $600, less $99, the amount due on the premium note given in the sixth year, with interest from the date of the writ. He accordingly found for the plaintiff in the sum of $527.39; and the defendant alleged exceptions, raising the questions stated by the court.

E. H. Lathrop, for the defendant.

E. H. Young, for the plaintiff.

BRALEY, J. The policy of insurance upon which this action is brought contains provisions not generally found combined in such contracts in the form presented. In the first paragraph it purports in full-faced capital letters to be a "non-forfeiture whole life" policy, issued upon application of the wife of the insured for her separate use and benefit, and after reciting the amount of the annual premium, and receipt of its first payment, and the amount of insurance secured, expressly provides "that after two or more of said annual premiums have been fully paid, this policy becomes a paid up, non-forfeiture policy, for an amount equal to the sum of one tenth of that hereby insured for each and every premium which shall have been so paid; requiring no further payments of premiums, subject to no assessments, but entitled to its apportionment of the surplus accumulation in the ratio of its contribution thereto." This is immediately followed by the company's promise to pay "the said sum insured" upon notice and proof of death during "the continuance and before the termination of this policy", and also "the just claim of the assured . . . under this policy." It also contained these subsequent provisions that "provided especially, and this policy is made, and it is accepted by the assured and the said insured * upon the express condition, that if the amount of any annual premium herein provided for is not fully paid, with the interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void, and wholly forfeited;" and "it is a further condition of this policy, accepted by the assured and the said insured, that if, at any time, any note, check or draft shall be given in payment or part payment of any annual premium then due or to become due, for or on account of this policy, and such note, check or draft, shall not be paid

* i. e. by the beneficiary and the person whose life is insured.

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according to the provisions thereof, then said policy shall become immediately void, and the company be thereby released from all obligations under it."

These clauses should not be construed as repugnant unless irreconcilable with any reasonable interpretation which incorporates them as forming a harmonious plan for insuring the life of the plaintiff's husband, and a construction is to be adopted which, if possible, will give force and effect to each of them. *Campbell* v. *New England Ins. Co.* 98 Mass. 381, 394. *Morrill & Whiton Construction Co.* v. *Boston*, 186 Mass. 217. *Thissell* v. *Schillinger*, 186 Mass. 180, 184.

The clause of non-forfeiture was devised to work automatically, and in order to become entitled to paid up insurance no affirmative action on the part of the assured, or the insured, became necessary, for as soon as two premiums at least had been paid, if the policy lapsed by reason of a failure to pay any annual premium thereafter due, she had a "paid up, non-forfeiture policy" for two tenths of the whole amount, and so long as the annual premium continued to be paid, each year added one tenth more to the amount of insurance already secured.

As the only condition required to give life to this part of the contract was the payment of premiums, we proceed to inquire whether there was any evidence to support the finding made in favor of the plaintiff that six annual premiums had been paid in the lifetime of the insured.

It is implied not only from the last two provisions already quoted, but from the further stipulation in the policy that "said company shall have a right to set off any demand it shall have against either said assured or insured, their assigns or representatives, arising incidentally to, or in connection with, this insurance, against any claim for which this company shall be liable thereon"; that the annual premium might be paid in whole or in part by the promissory note of either the assured or insured.

Beginning with the first payment the annual premium was adjusted partly by a payment of money and partly by the acceptance of the non-negotiable promissory note of the insured, and after the first premium a statement of subsequent premiums was sent to him yearly by the secretary of the defendant. Each

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statement after stating the amount of the annual premium, designated in detail the part to be paid in money; the amount of interest due on the "regular premium note" given the year before in part payment of the premium then due; the amount of the "former note, herewith returned"; and the balance showed the "total amount of the new note"; and then directed that payment in this manner could be made to its "authorized agent", and when so made the policy would be continued "in force for one year."

The agent each year, on receiving the note, and payment of the money, delivered the premium receipt, with the statement, "I have received the above payment, in cash and notes," and this course of dealing between the parties was uniform, and continued through several years. The last settlement was made on February 17, 1875, when the insured paid the whole premium by two notes, one called a "cash note", and representing the percentage of the premium which should have been paid in money, and the other the "premium note", representing the part payable by such a note. This last note also included the amount of all notes previously given, for the insured while paying the interest annually due thereon, had not paid any part of the principal of the six preceding notes. When the cash note became due, and remained unpaid, the secretary of the company wrote three indorsements on it, each extending the time of payment, and providing that if then paid "the payment of the within note . . . will hold the company liable under this policy", and thus by implication recognized the premium note as being part payment of premiums within the terms of the policy.

It is to be observed that after the first note had been given, each new note not only included the amount of the former note, which was returned and surrendered, but was increased by the note part of the yearly premium then due, and a possible argument, that the premium note last given was only the last renewal of the first and succeeding notes, and hence the premiums had not been paid is disposed of by the finding. *Eames* v. *Cushman*, 135 Mass. 573.

Under the terms of the policy, which provided no exclusive mode of payment, and thus left the parties free to adopt any method they pleased, and from the uniform course of dealing

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between them, the form and nature of the several transactions at the settlement of each annual payment, and the action taken by those lawfully representing the company, abundant evidence was furnished to support the conclusion of fact that six annual premiums had been paid on the policy. *White* v. *Connecticut Ins. Co.* 120 Mass. 330, 332. *Pierce* v. *Charter Oak Ins. Co.* 138 Mass. 151, 160. *Agawam National Bank* v. *Downing*, 169 Mass. 297. *Kendall* v. *Equitable Assur. Society*, 171 Mass. 568, 573. *Mowry* v. *Home Ins. Co.* 9 R. I. 346, 355. *Union Central Ins. Co.* v. *Taggart*, 55 Minn. 95, 96.

The defendant, however, further contends that as the policy calls for a forfeiture, if any note given in whole or part payment of premiums is not paid at maturity, "the contract lies both in the policy and the notes given for premiums," and as neither the last premium note, nor the "cash note", were paid there can be no recovery. *Pitt* v. *Berkshire Ins. Co.* 100 Mass. 500. By the express language of the policy the beneficiary agreed to pay the premiums, and she, as well as the insured, was bound by the clause relating to their payment, so that if a failure to pay these notes forfeited all rights under it, she cannot recover at common law. See *Pingrey* v. *National Ins. Co.* 144 Mass. 374, 382; *Boyden* v. *Massachusetts Ins. Co.* 153 Mass. 544, 546. And as the defendant is a foreign corporation the policy had no cash surrender value which she can recover under our statutes. *Haskell* v. *Equitable Assur. Society*, 181 Mass. 341, 342.

Under this argument the plaintiff has no better standing than if she sought to recover upon a paid up policy which contained the express condition that if a promissory note given in settlement of a premium due under the original policy, and outstanding when the paid up policy was issued, should remain unpaid, the policy should be forfeited. *Pitt* v. *Berkshire Ins. Co.*, *ubi supra*. *Holman* v. *Continental Ins. Co.* 54 Conn. 195, 212.

Nor would it affect its force, if applicable, that all the premiums except the last had been paid in money, as a failure to pay the notes was in effect a failure to pay the last premium, and she would have forfeited not only all claim to future insurance, but also to the paid up portion.

If this policy had contained the provision that after a certain

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number of premiums had been paid, upon a failure to pay future premiums the company would issue a paid up policy for a certain sum, less any indebtedness to the company, such an argument ought not to prevail, for the right under such a contract to a paid up policy would depend not upon a failure to pay an annual premium, but would rest on the number of such premiums already paid. By the contract in suit this result is obtained on the payment of the necessary number of premiums, but no further action, such as issuing a new policy for the amount of paid up insurance, or indorsing the amount on the old policy on demand, was required.

The clause for non-forfeitable paid up insurance, to have any place in the plan of life insurance presented by this contract, must be held to mean what it says, and to accomplish in this way a result similar to that reached under a form of contract to which we already have referred, and, if so, a failure to pay a subsequent premium would not destroy the effect of the payment of two or more previous premiums, as being payments within the meaning of this part of the policy.

All benefits under the policy of whatever kind would have been forfeited if the second annual premium had not been paid; after that was paid, the right to paid up insurance became vested, and the continuation of the general insurance would depend on the payment of the annual premium, while the clause declaring a forfeiture upon a failure to pay any note, given in payment, or part payment of the annual premium, if treated as equivalent to a failure to pay the premium itself, is limited in its scope, after the second annual premium had been paid, to the contract as a general policy of life insurance. *Cowles* v. *Continental Ins. Co.* 63 N. H. 300, 301. *Bruce* v. *Continental Ins. Co.* 58 Vt. 253. *Symonds* v. *Northwestern Ins. Co.* 23 Minn. 491.

In the last premium note, which had not matured when the policy lapsed, the condition is that the acceptance of the note, "shall in no wise affect the condition in said policy, that the non-payment of any other portion of said annual premium, or the non-payment of the annual interest hereon when due, shall, in either case, cause the immediate forfeiture of said policy."

The portion of the premium to which reference is made was covered by the cash note, and as the premium note had been

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accepted, the benefit secured by a payment of the cash note would have been a renewal of the general insurance for another year, and the addition of one tenth of the face of the policy to the amount of paid up insurance already accrued.

But there is nothing in the conditions of the policy, or of either note that directly refers to a forfeiture of the paid up insurance if the notes are not paid, and it should not be read into them by implication, for a forfeiture is for the benefit of the insurer, and where it is found to exist is confined to the terms which create it. If such stipulations are susceptible of more than one meaning that which is most favorable to the insured should be adopted. *McAllister* v. *New England Ins. Co.* 101 Mass. 558, 561. *Bartlett* v. *Union Ins. Co.* 46 Maine, 500. *Hoffman* v. *Ætna Ins. Co.* 32 N. Y. 405, 414. *Reynolds* v. *Commerce Ins. Co.* 47 N. Y. 597, 604. *Allen* v. *St. Louis Ins. Co.* 85 N. Y. 473. *Western Ins. Co.* v. *Cropper*, 32 Penn. St. 351, 356. *Fowkes* v. *Manchester & London Assur. Assoc.* 3 B. & S. 917, 923.

A failure to comply with these executory stipulations should be held therefore to relate to their effect as conditions precedent to continuing the general policy in force, and not as designed to destroy the contract of paid up insurance.

By this construction the different clauses of the policy are found not to be in conflict, but to present, combined in one contract, a form of life insurance that, after the assured had complied with certain clearly specified requirements, silently secured to her from year to year the full benefit ordinarily attaching to a paid up policy, and at the same time conferred the protection of continued general insurance for the full amount of the policy so long as the annual premiums were paid in the manner adopted, while the defendant was amply protected by the express stipulation that upon the death of the insured, if the settlement made was for either form of insurance, any indebtedness then due to it should be deducted from the amount to be paid to the plaintiff. *Cowles* v. *Continental Ins. Co.*, *Bruce* v. *Life Ins. Co.*, *Symonds* v. *Northwestern Ins. Co.*, *ubi supra.*

Exceptions overruled.

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COMMONWEALTH *vs.* AUGUST BECK.
SAME *vs.* JOHN F. MURPHY.

Worcester. October 4, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Intoxicating Liquors.

R. L. c. 100, § 49, regulating the transportation of intoxicating liquor to a city or town, in which licenses of the first five classes are not granted, by a railroad corporation or a person or corporation conducting a general express business, does not apply to or make illegal the transportation of intoxicating liquor to such a city or town by a natural person who is not conducting a general express business.

TWO COMPLAINTS, received and sworn to in the Police Court of Fitchburg on June 6, 1904, charging that each defendant "unlawfully did transport for hire and reward, for delivery in said Fitchburg intoxicating liquor, said Fitchburg then being a city where licenses of the first five classes to sell intoxicating liquors, are not granted, and said [Beck and Murphy respectively] not then and there regularly and lawfully conducting a general express business."

On appeal to the Superior Court the cases were tried before *Bell*, J. Before the jury was impanelled each defendant moved that the complaint against him be dismissed, for the reason that it set forth no offence known to the laws of this Commonwealth. The judge denied the motions and the cases proceeded to trial. The jury in each case returned a verdict of guilty; and the defendants alleged exceptions.

D. I. Walsh, T. L. Walsh & J. E. Sullivan, for the defendants.

R. Hoar, District Attorney, & *G. S. Taft*, Assistant District Attorney, for the Commonwealth.

BRALEY, J. No offence known to the common law is described in these complaints, and if they can be sustained it must be on the ground that they charge a misdemeanor under R. L. c. 100, § 49. This section in substance was originally St. 1897, c. 271, § 1, which was before this court for construction in *Commonwealth* v. *Intoxicating Liquors*, 172 Mass. 311, when it was

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said by Hammond, J., "The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegal keeping of intoxicating liquors, and to make it more difficult for the guilty to escape detection when setting up the fraudulent defence that the liquors found in the possession of the carrier were for delivery by him as such to some person."

The general rule of criminal pleading, that it is sufficient to charge a statutory offence in the language of the statute, cannot be applied, for there is no allegation that each defendant as a common carrier, or as a person lawfully conducting a general express business, had violated the provisions of this section. *Commonwealth* v. *Ashton*, 125 Mass. 384, 385. The offence described is that each defendant "not then and there regularly and lawfully conducting a general express business" brought and delivered intoxicating liquor for hire or reward in a city where licenses of the first five classes to sell such liquors had not been granted, and by its very terms excludes therefrom those whom the statute was designed to reach and punish.

Nor are the cases covered by the exception to the rule, that where the language of the statute is so general as to include cases which come within its terms, though not within its spirit, the offence is to be gathered from the whole act according to the intention of the Legislature, for the attempt is made in these complaints to enlarge, not to restrict the use of language, and to make the alleged offence penal by implication. *Commonwealth* v. *Barrett*, 108 Mass. 302, 303.

When the duly licensed seller delivers to the railroad corporation, or to others regularly and lawfully conducting a general express business, intoxicating liquor for transportation into a city or town where licenses of the first five classes have not been granted, he is required to plainly and legibly mark the vessels or packages containing the liquor with his name and address, and of the purchaser, or consignee, but there is no express language declaring that delivery by him of such liquor for transportation to persons other than those described shall be unlawful, or subject him to prosecution and punishment.

If the seller is free to deliver such liquors for carriage to persons other than to those named in the statute, no good reason is

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shown why such persons are not equally free to transport them without the act of transportation being considered a crime.

To bring the defendants within the allegations of the complaints resort must be had to the argument that the crime described is to be gathered from the general purpose of the law as shown by R. L. c. 100, §§ 49, 50, even if there is no direct language used creating such an offence.

Laws in derogation of the liberty, or general rights, of the citizen, however, are to be strictly construed, and what before their passage was a legal and legitimate employment or calling, does not become generally illegal and criminal when, in the exercise of the police power, a statute is passed prohibiting the prosecution of such employment or calling unless conducted in a certain manner by those whom it designates, but contains no language which in the ordinary meaning of words makes it applicable to other persons. *Commonwealth* v. *Martin*, 17 Mass. 359, 362. *Commonwealth* v. *Sylvester*, 13 Allen, 247. *Commonwealth* v. *Worcester & Nashua Railroad*, 124 Mass. 561, 563.

It is to be presumed that if it had been intended to impose restrictions upon the transportation of intoxicating liquors in addition to those which now appear in our laws, such intention would have been shown in clear and explicit language. This has not been done, and the inference follows that it was not intended to make the act with which the defendants are charged a crime.

The motion to dismiss should have been granted in each case.

Exceptions sustained.

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JOHN MURPHY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Worcester. October 5, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Negligence, Employer's liability. *Railroad.*

A section foreman of a railroad company, having charge of a gang of five men whose duty it is to transfer freight from one car to another, while the foreman selects the cars that are to be unloaded and checks the freight as it is transferred, can be found to be a person intrusted with superintendence over the five men within the meaning of the employers' liability act.

In an action, by a freight handler against the railroad company employing him, for injuries from falling between two freight cars standing side by side on parallel tracks, while working as one of a gang of five in transferring freight from one car to the other, it appeared, that the freight was to be wheeled in trucks over a wooden brow connecting a loaded car with the empty one to which the freight was to be transferred, that one end of the brow had iron hooks, with a cleat on the under edge, while the other end of the brow was bevelled so that the loaded trucks could be wheeled upon it without concussion, that by mistake the brow was placed wrong end to, so that, instead of the bevelled end, the end with the hooks rested on the car to be unloaded and the surface of the brow at that end was two inches or more above the floor of the car, that one of the men discovering this was about to reverse the brow when the superintendent in charge of the work said "the brow is all right, let it alone," that the plaintiff, who was not present when the brow was adjusted, was ordered by the superintendent with the other men of the gang to unload the car, that after two or three loads had been taken out by the other men, the plaintiff went upon the brow pulling a heavily loaded truck after him, when the brow fell, throwing the plaintiff with his load between the cars and causing the injuries. *Held*, that there was evidence of negligence on the part of the superintendent, and of due care on the part of the plaintiff, and that the plaintiff by using the brow under the orders of the superintendent did not assume the risk of injury from its being placed improperly.

A workman by his contract of service does not assume the risk of an accident caused by the negligence of a superintendent.

TORT, by a freight handler against the railroad company employing him, for injuries received in falling with a heavy load between two freight cars standing side by side on parallel tracks, when working as one of a gang of five in transferring freight from one car to the other, by reason of a wooden brow forming a bridge between the two cars slipping off at one end, while the plaintiff was upon it pulling after him a truck loaded with a

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barrel of wire weighing about eight hundred pounds, with a first count at common law alleging that the defendant put the plaintiff to work in an unsafe and dangerous place, a second count under the employers' liability act alleging a defect in the ways, works or machinery of the defendant, and a third count under the same act alleging negligence of the defendant's superintendent. Writ dated July 7, 1903.

In the Superior Court the case was tried before *Gaskill*, J. At the close of the evidence, the judge, by agreement of the parties, ordered a verdict for the defendant upon the first and second counts, and submitted the case to the jury on the third count. The jury were unable to agree, and thereupon the judge ordered a verdict for the defendant on the third count. The plaintiff alleged exceptions.

J. H. S. Hunt, *E. H. O'Brien & J. A. Thayer*, for the plaintiff.

A. P. Rugg, for the defendant.

BRALEY, J. The plaintiff finally relies on the third count of the declaration to sustain his cause of action, and the questions presented are whether there was any evidence of the defendant's negligence, or of the plaintiff's due care, which should have been submitted to the jury.

It appeared that Mulvaney was the section foreman of the defendant, having charge of a gang of five men including the plaintiff, whose duty it was under his instructions to unload, or transfer, freight from one car to another, while he selected the cars that were to be unloaded and checked the freight as it was transferred.

This was sufficient evidence for the consideration of the jury that he was intrusted by the defendant with superintendence over the plaintiff within the meaning of the statute, and for whose negligence it would be responsible. *Mahoney* v. *New York & New England Railroad*, 160 Mass. 573.

In the performance of this work by the men a movable platform called a brow was placed between, and formed a bridge from one car to the other over which the freight was wheeled in trucks. The brow in use at the time of the accident was provided with iron hooks at one end, with a cleat on the under edge. These hooks were intended to stick into the floor of the car thus preventing the brow from slipping, while the opposite

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end ran to a bevelled edge. There was evidence that the usual way of using it was to place the end with hooks on the car to which the freight was to be wheeled otherwise the loaded truck striking against the raised end as it rested on the hooks might cause it to slide from the car. When the brow used by the plaintiff had been placed in position, after the cars had been designated by Mulvaney, the raised end rested on the car to be unloaded and the surface of the brow at that end was two inches or more above the floor of the car. Before any work had been done one of the men, discovering its situation, was about to reverse it when Mulvaney said "the brow is all right, let it alone," and because of this order no change was made.

The method of doing the work as well as when it should be done, were to be determined by Mulvaney, and it became his duty when he ordered the plaintiff, with the other men, to go to work unloading freight to use reasonable care to prevent his being exposed to the danger that the brow might slip from the car when struck by the loaded truck as it rose from the level of the floor of the car to the top of the brow.

It could have been found that reversing the brow would have placed it properly, and prevented it from slipping from this cause, as the bevelled edge would have been substantially on a level with the floor of the car which was being unloaded, and thus the accident would have been averted. If this was not done because of the order then its dangerous position was due to him, and furnished evidence of his negligence. *Dean* v. *Smith*, 169 Mass. 569. *O'Brien* v. *Look*, 171 Mass. 36. *Knight* v. *Overman Wheel Co.* 174 Mass. 455.

If the accident was caused by the negligence of the superintendent, this was a risk not assumed by the plaintiff under his contract of service. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 536. *Murphy* v. *City Coal Co.* 172 Mass. 324, 327. *Mahoney* v. *Bay State Pink Granite Co.* 184 Mass. 287.

Nor can it be said as matter of law that by using the brow his conduct was such as to show either that he assumed the risk, or failed to exercise ordinary care.

He was not present when it was adjusted, and on being called went about his work in the usual way, and the accident

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happened after two or three loads had been taken out by the other men, and the plaintiff was taking out his first load.

Moreover, the work was being prosecuted under the supervision of Mulvaney, whose orders he was to obey, and when directed by him to enter the car with his truck and take a load to the connected car, he had a right to infer that this order would not have been given if the connecting platform was not properly placed. How far these conditions when coupled with his previous experience can be held to have affected his conduct, which otherwise might have been found to be careless, was a question of fact. *White* v. *Nonantum Worsted Co.* 144 Mass. 276, 277. *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155, 158. *Hennessy* v. *Boston*, 161 Mass. 502, 503. *Powers* v. *Fall River*, 168 Mass. 60, 65.

Both issues therefore under proper instructions should have been left to the determination of the jury.

Exceptions sustained.

EDWARD F. FOSTER *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Worcester. October 5, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability, ways, works or machinery, defective appliances, Contributory. *Railroad.*

In an action, by a delivery clerk in the freight house of a railroad company against his employer, for injuries from stepping through a hole in the floor of an empty freight car used as a passageway in unloading freight from another car and transporting it to the platform of the freight house, it appeared, that the method employed in unloading cars on the track second from the platform was to run the car opposite to a car on the first track, put a bridge between the two, connect the first car with the platform, and carry the freight on trucks across the bridge through the intervening car and over the second bridge to the freight house, that the empty car thus used as a passageway when the plaintiff was injured belonged to another railroad company, that the hole in its floor was partly covered by the rising board connecting the cars, and the plaintiff testified that, when he passed through the car pushing an empty truck before him on his way for the freight, his attention was directed to the rising board over which he was to pass rather than to any other portion of the way, and that he did not see the

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hole, into which he stepped and was injured. *Held*, that, irrespective of the manner in which the empty car got into the defendant's station, the defendant by taking and using it in unloading its own freight made it for the time a part of its ways, works or machinery within the meaning of the employers' liability act, for a defect in which it could be found to be liable. *Semble*, that the defendant also could be found to be liable at common law for furnishing the plaintiff with defective appliances with which to perform his work. *Held*, *also*, that the question whether the plaintiff was in the exercise of due care was one of fact for the jury.

TORT, by a delivery clerk in the freight house of the defendant at Leominster, for injuries caused by his stepping into a hole in the floor of an empty freight car used as a passageway in unloading freight from another car and transporting it to the platform of the freight house, with a count under the employers' liability act alleging a defect in the ways, works or machinery of the defendant, and a count at common law alleging a failure to furnish the plaintiff with safe instrumentalities or a safe place in which to work. Writ dated December 13, 1902.

In the Superior Court *Gaskill*, J. ordered a verdict for the defendant, and reported the case for determination by this court. If the ruling was right judgment was to be entered for the defendant; otherwise, judgment was to be entered for the plaintiff in the sum of $1,500.

J. E. McConnell, for the plaintiff.

A. P. Rugg, (*H. H. Thayer* with him,) for the defendant.

BRALEY, J. It is the contention of the plaintiff that upon the evidence shown by the report whether he was in the exercise of due care, or the defendant was negligent were issues of fact upon which the jury could have found in his favor, and therefore the direction of a verdict for the defendant was wrong.

In the performance of his duty as delivery clerk the plaintiff was required to unload freight from the cars as called for and deliver it to consignees, and he had a right to rely on the presumption that the defendant would not furnish defective appliances with which he was to perform the work.

The car in which he was injured was not a part of the permanent instrumentalities provided for the reception, delivery or storage of freight, and he had not been in it until the morning of the accident, and had not previously known of the defective condition of the floor.

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At that time the car had been opened, and all the usual arrangements made for the delivery of the freight, and the hole in the floor was partly covered by the rising board connecting the cars, and which obstructed a full view of it by the plaintiff. He testified that when he passed through pushing an empty truck before him on his way for the freight, his attention was directed to the rising board over which he was to pass, rather than to any other portion of the way, and that he did not see the hole.

While it was his duty in the exercise of ordinary care not to expose himself to unusual danger his conduct under the conditions disclosed cannot be said as matter of law to have been careless. *Gilman* v. *Eastern Railroad*, 10 Allen, 233. *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282. *Myers* v. *Hudson Iron Co.* 150 Mass. 125, 134. *Gustafsen* v. *Washburn & Moen Manuf. Co.* 153 Mass. 468, 474. *Anderson* v. *Clark*, 155 Mass. 368. *Bartolomeo* v. *McKnight*, 178 Mass. 242, 246.

In the conduct of its business, the defendant was required as a carrier of freight to deliver it to the consignees at the station where the plaintiff was employed, and if his injuries had been caused by a defective platform provided for his use by the defendant, there would seem to be no sufficient reason why it could not be held liable for such defect. *Snow* v. *Housatonic Railroad*, 8 Allen, 441. Instead of this the method generally employed seems to have been that when a freight car was to be unloaded on the second of the two tracks the "usual, customary and only way" was to run such car opposite a car on the first track, put a bridge between the two, and then connect the first car with the platform of the freight house; the freight was then carried on trucks across the bridge through the intervening car, and over the second bridge to the freight house.

If it had placed one of its own cars in position for this purpose there would be no substantial difference between the use of the car, or of a movable or stationary platform to accomplish the work, and either would be an appliance furnished by the defendant.

It chose to use a freight car belonging to another railroad company which apparently had been run over its tracks to this station. Although the report does not show whether the defend-

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ant was to be paid for this service, or was merely forwarding the car, or what arrangement, if any, existed between it and the company owning the car, it is enough that whatever the character of the defendant's possession, it took and utilized this car, which at the time of the accident was being used solely for the purpose of unloading its own freight, and between itself and the plaintiff must be treated as a part of its works. *Spaulding* v. *Flynt Granite Co.* 159 Mass. 587, 588. See *Delory* v. *Blodgett*, 185 Mass. 126.

The plaintiff is not obliged to rely exclusively upon his count at common law, for under the statute it was temporarily a part of the defendant's rolling stock, and of its works and machinery. It was being used "as one of the instruments of its business." St. 1887, c. 270, § 1, cl. 1. And this would be so under the circumstances of this case under the employers' liability act as originally passed, or as amended by St. of 1893, c. 359. *Bowers* v. *Connecticut River Railroad*, 162 Mass. 312, 317.

For this reason the rule which imposes upon the defendant the duty of properly inspecting cars of other railroad companies delivered to it for transportation, and its consequent liability, whether at common law, or under St. 1887, c. 270, § 1, cl. 2, for injury to its servants if this duty is neglected or improperly performed, beçomes unimportant in the decision of this case. See *Mackin* v. *Boston & Albany Railroad*, 135 Mass. 201; *Coffee* v. *New York, New Haven, & Hartford Railroad*, 155 Mass. 21, 24.

There is a class of risks not fully defined that may arise in the ordinary course of employment, and from their transitory character are said not to impair or permanently affect the ways, works and machinery, and for which the master is not held liable to a servant who may be injured while working under such temporary conditions. *Whittaker* v. *Bent*, 167 Mass. 588. *Kanz* v. *Page*, 168 Mass. 217. *Thompson* v. *Norman Paper Co.* 169 Mass. 416, 417. See *Northern Pacific Railway* v. *Dixon*, 194 U. S. 338, 346. But where these instrumentalities are originally defective, or become unsafe from want of repair, such a defence is not open. *Meehan* v. *Speirs Manuf. Co.* 172 Mass. 375, 377.

If the defendant adopted and used the car as a way or platform over which freight was to be unloaded and transferred to its freight house, or delivered to consignees, then manifestly at

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common law or under the statute it was required to use every reasonable precaution to see that it was suitable for this purpose; and whether this duty had been discharged was to be determined upon the evidence. *Snow* v. *Housatonic Railroad, ubi supra.* See *Trimble* v. *Whitin Machine Works*, 172 Mass. 150, 153.

As the evidence was open to more than one conclusion on both of the questions presented, its weight and all just inferences to be drawn therefrom were for the jury, and the case should have been submitted to them. In accordance with the terms of the reservation contained in the report, the order must be,

Judgment for the plaintiff in the sum of $1,500.

ORLANDO W. NORCROSS *vs.* HORACE WYMAN.

Worcester. October 6, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Contract, Building contracts. *Architect. Arbitrament and Award.*

A provision in a building contract, that the decision of the architect as to the interpretation of the specifications and on all questions relating thereto shall be final and binding upon the owner and the contractor, is valid, and when a decision thereunder has been made by the architect it is binding on the parties.

A contract under seal for the construction of a building contained the following provision: "The architects shall be the sole interpreters of their drawings and these specifications, and except as otherwise provided or specified, their decision upon all questions relative to drawings, specifications or contract for the said building shall be final and binding upon the owner and the contractor." By the contract, which included the specifications and plans, the contractor was required to provide a suitable foundation for the building. He encountered a quicksand which required more work than had been anticipated. The architects decided that the expense of the work made necessary by the quicksand was extra work not included in the contract price. After this decision had been communicated to the contractor, the owner was notified and refused to be bound by it. *Held*, that under the agreement of the parties the decision of the architects was final, and that for the purposes of their decision they were free to adopt such legal principles as they honestly believed to be applicable and to act on such evidence as they chose to receive, and whether the contract by its true construction required the plaintiff to excavate the quicksand was immaterial. *Held, also*, that, regarding the refusal of the owner to accept the architects' decision as an attempt to revoke the power conferred on the architects by the contract, the power having been conferred by an instrument under seal could not have been revoked by parol, and that an attempted revocation under seal by the

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owner would have come too late after the decision of the architects had been communicated to the contractor, even if the owner had had a right, which he had not, to rescind the contract containing the provision conferring the power.

APPEAL from a judgment ordered in the Superior Court by *Hardy*, J. upon the report of an arbitrator to whom the parties had submitted their differences by an agreement of submission under R. L. c. 194, dated April 15, 1902.

The order of the judge was as follows: that "the award be accepted excepting the part thereof awarding to the plaintiff the sum of $1,301.52 being the item for extra foundations as set forth in the second claim in the account annexed to the agreement of reference. That portion of the award is rejected. Judgment is to be entered on the award in accordance with the above direction."

Judgment was entered accordingly; and the plaintiff appealed.

F. F. Dresser, (*T. H. Gage, Jr.* with him,) for the plaintiff.

C. M. Thayer, (*C. A. Hamilton* with him,) for the defendant.

BRALEY, J. Under the contract, which included the specifications and plans, the plaintiff was required to provide a suitable foundation for the building to be erected, but the nature of the soil to be excavated was such that more work ultimately was required for this purpose than he originally anticipated.

It is his contention that this work is not covered by the contract, and that he is entitled to extra compensation for its performance.

By the specifications it was provided that "The architects shall be the sole interpreters of their drawings and these specifications, and except as otherwise provided or specified, their decision upon all questions relative to drawings, specifications or contract for the said building shall be final and binding upon the owner and the contractor."

While putting in the foundation the plaintiff discovered a quicksand, and asked the architects, subject to whose supervision the work was being done, for instructions.

Upon the evidence before him, the arbitrator found as a fact that the architects decided that the clause in the specifications relating to the excavation required was not inserted with the intent that the expense of the work made necessary by the quicksand should be borne by the plaintiff, as this circumstance

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was unforeseen by him or them, and that the extra work so caused was not included within the terms of the contract.

If the architects were clothed with authority to make this decision it is conclusive between the parties.

The clause which defined their powers and duties was contained in a contract under seal, voluntarily entered into by the parties, and provided a simple and convenient method for the settlement of any questions that, as the work proceeded, might arise over the interpretation of the contract, or of the drawings and specifications. Or, in other words, whenever it became necessary, whether for the information of the plaintiff, who had stipulated to work under their direction, or for the benefit of the defendant in securing a strict compliance with the terms of the contract, it was left to the architects finally to determine what their drawings and specifications covered as to the quantity and quality of the work that was required to be done by the plaintiff.

In the practical working of this plan of supervision and adjustment of differences the cumbersome formalities of a notice to or a hearing of the parties before making a decision evidently were not contemplated, as such a requirement is not found in any provision of the contract. Neither was it required by the character of the undertaking. For the purposes of their decision they were free to adopt such legal principles as they honestly believed applicable, and to act on such evidence as they chose to receive. *Boston Water Power Co.* v. *Gray*, 6 Met. 131, 169. *Flint* v. *Gibson*, 106 Mass. 391, 395.

Although the defendant when notified declined to be bound by their decision, this action was taken after it had been communicated to the plaintiff, and, if it is treated as an attempt formally to revoke the power previously given, it came too late, and, if it had been in time, the power having been conferred by an instrument under seal could not have been revoked by parol. *Wallis* v. *Carpenter*, 13 Allen, 19, 24.

Besides, an attempted rescission by the defendant even if under seal and before the power had been exercised, could not have effected a revocation of the authority of the architects, for this was conferred by one part of an agreement which as a whole the defendant was not entitled to rescind. *Haley* v. *Bellamy*, 137 Mass. 357, 359.

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It does not become important to decide how far an agreement for the arbitrament of the construction of a written contract, or of the quantity and value of work to be performed under it, effectually could be pleaded in bar to an action on the contract itself, or enforced by a bill in equity for specific performance. *Miles* v. *Schmidt*, 168 Mass. 339, 340. Not only had the decision been made, but the question decided, if not treated as technically submitted to them as arbitrators, was one which the parties could leave to the determination of the architects. *Palmer* v. *Clark*, 106 Mass. 373. *Robbins* v. *Clark*, 129 Mass. 145. *McMahon* v. *New York & Erie Railroad*, 20 N. Y. 463, 465. *Omaha* v. *Hammond*, 94 U. S. 98. See *White* v. *Middlesex Railroad*, 135 Mass. 216, 220, and cases cited. Compare *Smith* v. *Boston, Concord & Montreal Railroad*, 36 N. H. 458, 489, 490.

The arbitrator, therefore, correctly ruled that the architects were authorized to act on the question submitted to them, and their decision thereon was binding on the defendant.

As the award well can rest on this ground, it becomes of no consequence to consider whether the contract, fairly construed, required the plaintiff to excavate through the quicksand, although on this question the arbitrator ruled in his favor. See *Stuart* v. *Cambridge*, 125 Mass. 102.

Award of the arbitrator accepted for the full amount; and judgment ordered thereon for the plaintiff.

CHARLES H. PERKINS *vs.* GEORGE H. RICE & another.

Worcester. October 6, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

Evidence, Admissions and confessions. *Landlord and Tenant. Elevator. Practice, Civil*, Exceptions, Discretionary power of presiding judge, Verdict.

In an action for injuries from the alleged negligent operation of an elevator in an apartment building owned by the defendant and let to various tenants, if the defendant denies that he was in control of the elevator at the time of the accident, the plaintiff for the purpose of proving such control may show that shortly

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before the accident the defendant procured a policy of indemnity insurance against loss or damage from accidents arising in operating the elevator, and that such insurance was in force when the plaintiff was injured.

The exclusion of material evidence is none the less a ground for exception because there was uncontradicted testimony which if believed was amply sufficient to establish the fact which the excluded evidence was offered to prove.

It is not within the discretionary power of a presiding judge at a jury trial to exclude material evidence because he thinks that evidence already has been introduced sufficient, if believed, to establish the fact to be proved.

After a general verdict for the defendant in an action of tort, an exception of the plaintiff to the exclusion of evidence will be sustained if the rejected evidence was material on any of the issues submitted to the jury, as the verdict may have been rendered on the issue on which the evidence was offered.

TORT for injuries alleged to have been caused by the negligent operation of an elevator in an apartment building of the defendants on Wellington Street in Worcester. Writ dated August 5, 1902.

At the trial in the Superior Court before *Maynard*, J. the jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

W. Thayer, (*F. A. Walker* with him,) for the plaintiff.

C. C. Milton, for the defendants.

BRALEY, J. This is an action of tort brought to recover damages for personal injuries received by the plaintiff when seeking to use an elevator maintained in an apartment building rented to various tenants, but the ownership of which was admitted by the defendants.

The trial in the Superior Court resulted in favor of the defendants, and the case is before us on exceptions taken by the plaintiff to the exclusion of certain evidence offered by him, and to portions of the instructions under which the case was submitted to the jury.

The admission of ownership of the building was accompanied by a denial of the defendants that they were in control of the elevator at the time of the accident, and this must be taken to mean that they required the plaintiff to prove the essential fact, that in renting the apartments they still retained control of it. If this was proved then they might be held liable for its defective condition, if the plaintiff could establish his due care, and negligence on their part in the discharge of any duty they owed to him. See *Marwedel* v. *Cook*, 154 Mass. 235, 236; *Wilcox* v. *Zane*, 167 Mass. 302, 306; *Coupe* v. *Platt*, 172 Mass. 458.

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Although each of the defendants was a witness, neither appears to have been asked directly any questions relating to their retention of possession of the elevator, but in the cross-examination of one of them the plaintiff for the sole purpose of proving such control formally offered to show, that shortly before the accident they had procured a policy of indemnity insurance against loss or damage from accidents arising in operating the elevator, and that such insurance was in force when he was injured. Upon objection being made by their counsel, who stated in reply to a question asked by the presiding judge, that they still denied any control of the elevator, the evidence offered was excluded. The reasons for such exclusion are not given, and it is to be determined whether the evidence was admissible in support of this issue.

The exceptions are silent as to the form in which it was sought to introduce the proposed proof, whether by further cross-examination of the defendants, or by the policy itself; but as the evidence was in substance admissible, either course could have been taken, for the proof offered was in the nature of an admission by the defendants. *Smith* v. *Palmer*, 6 Cush. 513, 520, 521.

If they had taken such a policy it was evidence of their interest in some form in the elevator, and with the accompanying proof might have been found sufficient to satisfy the jury that, notwithstanding their denial, they still retained the management of it. The probative force of this evidence was for the jury, and it properly could be argued, that the defendants would not have deemed it prudent to secure indemnity insurance on an elevator not within their control, or for the careless management or defective condition of which they could not be held responsible.

When repairs are made on premises by those whom it is sought to charge with liability for their defective condition, evidence of this fact has been deemed competent whether they were made before or after the accident, as being inconsistent with a denial of ownership, although such evidence is not competent as an admission of liability for the accident itself. *Readman* v. *Conway*, 126 Mass. 374. *Poor* v. *Sears*, 154 Mass. 539, 549. *Shinners* v. *Proprietors of Locks & Canals*, 154 Mass. 168. *Anderson* v. *Duckworth*, 162 Mass. 251, 254. *O'Malley* v. *Twenty-Five Associates*, 170 Mass. 471, 477.

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In principle, there is no difference whether evidence of this character is offered to prove possession and control of an elevator, or of the premises in which it may be located. Proof of any act of the defendants whom it was sought to hold tending to show the exercise by them of dominion over either, was competent for this purpose, and the exclusion of the plaintiff's offer of proof was erroneous.

The fact that there was uncontradicted testimony which, if believed, was amply sufficient to prove that the defendants had not relinquished but retained such control does not cure the error; for the plaintiff was entitled to the full benefit of any and all relevant and material evidence properly offered by him upon this issue.

Nor can it be held that the large discretionary powers of the Superior Court include the right to reject evidence at a jury trial when regularly offered, because in the opinion of the presiding judge sufficient proof, if believed, already has been introduced to establish the fact to be proved.

Neither are we able to say that no injustice would be done if the rule adopted in *Hinckley* v. *Somerset*, 145 Mass. 326, 338, that if incompetent evidence is admitted "to prove a fact which the conceded facts necessarily establish," the exceptions will not be sustained, should be extended to include a case like this. For beyond the fact of their title the defendants made no concessions, but went to the jury on all the issues, and, as they obtained a general verdict, there is substantial support for the position that it may have been rendered on the very issue on which the plaintiff desired to introduce the rejected evidence.

As the exceptions must be sustained by reason of this error, a discussion of the other questions raised is not required; for at another trial they may not become material in the form in which they now are presented.

Exceptions sustained.

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AUGUSTE BERTHOLET *vs.* J. W. BISHOP COMPANY.

Bristol. October 24, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

In an action by a carpenter against his employer for injuries alleged to have been caused by the negligence of the defendant's superintendent, it appeared, that the plaintiff was engaged with others, under the orders of a foreman in charge, in moving a heavy hard pine timber forty-two feet long, and that as the men were holding the timber for a minute and a half or more, a little longer than at other times, while a barrel beneath the timber was being rolled forward, the timber being too heavy for the men came down with them, injuring the plaintiff. Before this the men had said to each other, but not to the superintendent, that they had to exert more strength with this timber, and that there were not men enough. It appeared that fewer men were used in moving this timber than had been used in moving two similar timbers. On exceptions by the plaintiff after a verdict had been ordered for the defendant, the plaintiff disclaimed any complaint as to the number of men employed, but contended that he had a right to go to the jury on the ground that the superintendent was negligent in not ordering the men to lower the timber before it fell. *Held*, that in the absence of any evidence to show why the number of men was reduced there was not sufficient evidence to warrant a finding that the superintendent ought to have known that the slightly longer strain to which the men were subjected was beyond their strength, especially in view of the plaintiff's express disclaimer of any complaint that too few men were employed, and that the verdict rightly was ordered for the defendant.

TORT under R. L. c. 106, § 71, by a carpenter against his employer for injuries alleged to have been caused by the negligence of a person acting as the defendant's superintendent. Writ dated June 5, 1903.

In the Superior Court *Hitchcock*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions.

A. Auger, for the plaintiff.

O. Prescott, Jr., for the defendant.

LORING, J. The plaintiff was a carpenter in the employ of the defendant corporation, and at the time of the injury here complained of was engaged with others in moving a hard pine timber which was forty-two feet long and ten by thirteen inches thick. The method employed for moving the stick was for a

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gang of men to lift the forward end and place a kerosene barrel under it, some twelve to fourteen feet back from that end. The men then divided, some to hold the forward end and the others the rear, while the stick was rolled forward until the barrel was twelve to fourteen feet from the rear end of it. "Then," in the words of the bill of exceptions, "the men would be ordered to lift the rear end of the timber while one of the men, and sometimes the foreman, would roll the barrel towards the forward end to within twelve or fourteen feet of the end, and the men would then be ordered to lower the timber and push it on the barrel, and the same operation would be repeated until the timber had reached its destination."

Four or five timbers had been moved in this way before the day of the accident to the plaintiff. The accident to the plaintiff happened about nine o'clock in the morning, after the plaintiff and other employees had been moving the timber for about an hour, and after the timber "had been lifted eight or ten times so as to move the barrel along." At the time in question the men were ordered to raise the stick, by a foreman who was in charge of the work and who on the evidence could be found to be a superintendent within the employers' liability act. The barrel was then moved forward to "about ten feet" of the forward end, in place of twelve or fourteen feet as usual, "one or two feet further than usual." In the words of the plaintiff's testimony, "We held it a little longer and put the barrel a little further." "It took generally from a minute to a minute and one half to lift the timber and push the barrel along. At the time of the accident it took 'a little longer than at the other times,' about a minute and a half or more." "The weight of the timber was too heavy for the men that were holding it." While the men were thus holding up the rear end of the timber the plaintiff heard a cry, the timber fell, and as it "came down it caught his left hand and foot, injuring the same and also his right knee." On cross-examination the plaintiff testified that he did not know before he was hurt that the men were getting too tired to move the timber, but that some of them had complained that "we had to use more strength, . . . every man said it to one another," but not to Mr. Wing the superintendent; they said among themselves that there were not enough men.

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No evidence was offered by the plaintiff beyond his own testimony. On the plaintiff resting the presiding judge directed the jury to find a verdict for the defendant, and the case is here on an exception to that ruling.

The declaration contains two counts, but the second count was waived by the plaintiff and he went to trial on the first count only, which was based on the negligence of the superintendent under the employers' liability act. At the argument before us the counsel for the plaintiff also expressly disclaimed any complaint as to the number of men employed on the work, and stated that what he did contend was that he had a right to go to the jury on the ground that the superintendent was negligent in not ordering the men to lower the timber before it fell.

On the evidence the stick must be taken to have fallen because the men were too tired to hold it longer, and the cry given must be taken to have been a cry of warning that the timber was falling, and not an order to lower it.

The evidence did not warrant a finding that the superintendent was negligent on the ground set up by the plaintiff. In the first place the men did not say among themselves that they were too tired to hold the stick while the barrel was being moved forward. What was said by them was that they had to exert more strength, and that there were not enough men. But this was said among themselves and not to the superintendent. Beyond the fact that fewer men were used to move the timber on the day in question than had been used to move the two of the five previously moved which were similar to the one in question, there is nothing from which it could be inferred that the strain of holding up the end to which the superintendent subjected the men or allowed them to be subjected, was beyond their strength. It is true that the testimony showed that the barrel was in fact rolled one or two feet further than usual or "'to about ten feet' of the forward end," in place of twelve to fourteen, and that the timber was held a little longer than usual "about a minute and a half or more," in place of "from a minute to a minute and one half." We assume that the jury could have found that the barrel was moved further forward than usual by order of the superintendent, although this is by no means plain.

The fact that fewer men were used in moving the timber on

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the day in question than had been used on the previous day or days in moving two similar timbers, without any evidence as to why the number of men used was reduced, is not enough to warrant a finding that the superintendent ought to have known that the slightly longer strain to which the men were exposed was beyond their strength, especially in view of the plaintiff's express disclaimer of any complaint that too few men were employed. There was nothing else in the testimony from which that inference could be drawn.

Exceptions overruled.

DAVID T. CLARK & others *vs.* HENRY M. KNOWLES.

Bristol. October 24, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, To enforce liability of stockholder in foreign corporation. *Conflict of Laws*. *Equity Pleading and Practice*, Parties.

A bill in equity cannot be maintained to enforce the statutory liability of a stockholder in a corporation organized in another State, upon a claim not yet reduced to a judgment, without making the corporation, or its assignee, and all the stockholders parties to the suit.

In a suit in this Commonwealth to enforce the statutory liability of a stockholder in a corporation organized in another State, the decisions of the highest court of that State as to the meaning of the substantive provisions of the statute creating the liability must be followed, but the mode of procedure and practice in giving the remedies provided by the statute depend upon the law of this Commonwealth where the relief is sought, and a decision of the other State that neither the corporation nor its assignee is a necessary party to such a suit would not be binding on this court.

Whether a creditor of a corporation organized under the laws of another State, in a suit in that State to enforce the statutory liability of stockholders, can obtain a decree against non-resident stockholders upon whom no service has been made, establishing everything that need be established in the home of the corporation, so far as to furnish a foundation for a subsequent suit against such stockholders in this Commonwealth, *quære*.

BILL IN EQUITY, filed May 6, 1903, by David T. Clark and four hundred and twenty-four other creditors of the Colorado State Bank of Grand Junction, a corporation organized under the laws of the State of Colorado, to enforce a statutory liability of the defendant under Session Laws of Col. 1885, p. 264, § 1.

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In the Superior Court the defendant demurred. The judge of that court who heard the case sustained the demurrer and made a decree dismissing the bill. The plaintiffs appealed.

H. W. Hervey, for the plaintiffs.

E. D. Stetson, for the defendant.

KNOWLTON, C. J. The plaintiffs, four hundred and twenty-five in number, averring that they are the only known creditors of the Colorado State Bank of Grand Junction, a corporation, bring this bill, in behalf of themselves and all other creditors, against the defendant as a stockholder in the bank. It is alleged that the corporation is insolvent, that proceedings to wind up its affairs have been taken, that a receiver has been appointed under the laws of Colorado, and that certain dividends have been paid. It is said that a large amount of indebtedness is still unpaid, while there is but little property of the corporation that can be used to pay it.

The statute of Colorado, found on page two hundred and sixty-four of the Session Laws of 1885, is as follows: "Section 1. Shareholders in banks, savings banks, trust, deposit, and security associations, shall be held individually responsible for debts, contracts, and engagements of said associations, in double the amount of the par value of the stock owned by them respectively."

It is averred in the bill that the construction, interpretation and meaning of this statute, as determined by the court of last resort in Colorado, are in substance as follows: "Each shareholder of record at the date of the bank's failure is individually and severally liable for the debts and obligations of the bank in an amount equal to twice the par value of the stock so held by him, and this liability is in addition to and independent of any liability on account of his original subscription for the stock. This liability in double the par value of his stock, is in the nature of additional security to the creditors in dealing with the bank and constitutes a fund for the benefit and protection of all creditors. It should properly be recovered in an action brought by one or more of the creditors for the common benefit of all creditors. Neither the bank nor the assignee is interested in this fund, nor can either enforce the liability, nor is either a proper or necessary party to any action brought to enforce such recovery. The aforesaid fund is exclusively for the benefit of the

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creditors, and forms no part of the assets of the corporation. While in the first instance the assets of the bank or corporation may constitute the primary or regular fund for the payment of corporate liabilities, when by reason of dissolution or insolvency an action against the corporation would be unavailing, or when the remaining assets, if any, consist of worthless or doubtful claims, or claims in litigation, the creditors are not required to wait the collection of such. The shareholders must pay promptly and take upon themselves the onus and risk as to all such claims, looking to the assignee for whatever may be realized on the remaining assets."

This statute, so interpreted, apart from the statement that neither the bank nor the assignee is a necessary or proper party to an action brought for recovery under it, of which we will speak more particularly later, shows that on the establishment of such a corporation, a fund is created in addition to the assets of the corporation, as a guaranty to creditors that the corporation's debts will be paid. It is to be collected for the protection of all creditors, each one of whom has an interest in it. While each stockholder is individually and severally liable for the payment of his share, his liability is like that of all other stockholders, and ultimately each should pay only his proper proportion, according to his ownership of stock. But this liability outside of and in addition to the liability of the corporation itself, is only collateral to it, the corporation being under the primary obligation to pay. It follows that if the stockholders or any of them, should pay corporate debts more than the excess of the indebtedness above the amount which the assets of the corporation are sufficient to pay, they could recover back the excess of their payment from the corporation; or if any one of the stockholders should pay more than his proper proportion, he would have a right to a contribution from other stockholders to reduce his loss to its proper proportion. In all essential particulars, therefore, in reference to the proper mode of giving a remedy and of adjusting the rights of the parties in interest, this statute calls for procedure similar to that referred to in many cases, namely, by a suit in equity to which the corporation is a party, brought for the benefit of all the creditors against all the stockholders. *Hadley* v. *Russell*, 40 N. H. 109. *Erickson*

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v. *Nesmith*, 4 Allen, 233. *Post* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341. *New Haven Horse Nail Co.* v. *Linden Spring Co.* 142 Mass. 349. *Hale* v. *Allinson*, 188 U. S. 56. *Finney* v. *Guy*, 189 U. S. 335. *Terry* v. *Little*, 101 U. S. 216. *Elkhart National Bank* v. *Northwestern Guaranty Loan Co.* 87 Fed. Rep. 252. *Marshall* v. *Sherman*, 148 N. Y. 9. Ordinarily such a bill cannot be maintained elsewhere than in the State where the corporation is organized. There must be jurisdiction of the corporation as well as of the stockholders. The general principles which lie at the foundation of the decisions in the cases above cited are controlling in the present case. Accordingly, it was held in *Bates* v. *Day*, 198 Penn. St. 513, a decision under the statute now before us made since the decision in *Zang* v. *Wyant*, 25 Col. 551, interpreting the statute, that the personal liability of a stockholder in Pennsylvania could not be enforced by a bill in equity, because the corporation and the other stockholders were not made parties defendant. A like decision was made by the Supreme Court of Rhode Island in *Miller* v. *Smith*, 26 R. I. 146, which was also since the decision in *Zang* v. *Wyant*, the language of the court being in part as follows: "The Colorado statute contemplates a proceeding in equity in that State by the creditors of the corporation against all the stockholders thereof, for the purpose of establishing a pro rata liability, and until such proceeding has been had this court cannot justly enforce the liability against a single stockholder."

In reference to the statement in the bill that, under the decision of the Supreme Court in Colorado, neither the corporation nor the assignee is a proper party to the bill, we do not understand that the court has so decided. We understand the decision referred to in the bill is that in *Zang* v. *Wyant*, *ubi supra*, and we understand that decision to have gone on the ground that the defendants had waived their right to set up a want of proper parties by answering over after the demurrer.

But if we take the statement of the bill to be correct, as perhaps we are bound to do on this demurrer, it being a statement of the law of another State, the result is the same. Except in the last part of a single sentence which we have quoted, in reference to the necessity or propriety of making the corporation a party, there is nothing in the bill which indicates that the true

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construction of the statute is different from our statement of it already made. In all other particulars there is no question about the meaning of the act according to the interpretation referred to in the bill. It is a familiar rule of pleading in equity that all persons interested in the subject matter of the suit shall be either plaintiffs or defendants, that the rights of all may be settled, complete justice be done, and future litigation prevented. This rule makes it necessary in this case to have all the stockholders joined as defendants. It makes it equally necessary to join the corporation, or its representative, the assignee. To say nothing of the importance of bringing in to defend against the claims of creditors the party which alone has knowledge of them, a court of equity will not compel the stockholders to go to trial and submit to a decree establishing claims against them, and leave the corporation at liberty to show that the claims are groundless when the stockholders afterward seek to hold the corporation upon its primary liability to the extent of the assets which may still be applicable to the payment of its debts. The corporation should be brought in, so that the decree establishing the indebtedness may be binding in favor of the stockholders against the corporation, as well as against the stockholders in favor of the creditors.

If the court of Colorado has decided otherwise, its decision is not binding upon this court. *Scott* v. *Neely*, 140 U. S. 106, 116. *Elkhart National Bank* v. *Northwestern Guaranty Loan Co.* 87 Fed. Rep. 252. *Finney* v. *Guy*, 189 U. S. 335. Its decision as to the meaning of the substantive provisions of the statute must be followed and we do not attempt to question it. But when the substantive provisions are made plain, the mode of procedure and practice in giving the remedies provided by the statute, depend upon the law of the place where the remedy is sought. We cannot give effect to the provisions of this statute in Massachusetts if it calls for remedies which, according to our rules of practice, cannot be given for want of jurisdiction of the necessary parties.

Whether in proceedings instituted in Colorado, to which the corporation is a party, creditors may have a remedy under this statute against non-resident stockholders upon whom no service is made, so far as to bind them upon the principles stated in *Howarth* v. *Lombard*, 175 Mass. 570, 577, by a decree establish-

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ing everything that need be established in the home of the corporation, and thus have a foundation upon which to stand in a subsequent proceeding where service can be made upon these stockholders, is a question which we need not now decide. See *Hancock National Bank* v. *Ellis*, 172 Mass. 39, 45. Even if the remedy provided should prove to be entirely ineffectual against non-resident stockholders, it would not be a sufficient reason for our disregarding established principles and rules of practice.

The proceedings in the courts of Colorado, set out in the bill, have not determined enough to subject the defendant to a decree in favor of the plaintiffs here. It appears that he was not made a party to the suit against stockholders there. Neither the corporation nor the assignee was a party. For these reasons nothing that was determined in that suit can affect the defendant. The proceedings in insolvency do not include that which establishes liability in this case.

The recent decisions in this court and elsewhere, by which the liability of stockholders in foreign corporations has been enforced after a judgment obtained against the corporation, stand upon different grounds and need not be considered. *Hancock National Bank* v. *Ellis*, 166 Mass. 414; *S. C.* 172 Mass. 39. *Howarth* v. *Lombard*, 175 Mass. 570. *Broadway National Bank* v. *Baker*, 176 Mass. 294. *Whitman* v. *Oxford National Bank*, 176 U. S. 559. *Hancock National Bank* v. *Farnum*, 176 U. S. 640.

Decree affirmed.

FRANK ENOS & others *vs.* CHURCH OF ST. JOHN THE BAPTIST (first defendant by amendment) & others.

Bristol. October 24, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, Suit by member to restrain corporation. *Religious Society*, Powers of trustees, Corporate powers.

If a bill in equity by a member of a corporation, to restrain the corporation from doing certain acts, does not allege that the plaintiff sought redress from the corporation itself or its officers before resorting to the courts, but the bill is not demurred to, and a master subsequently finds that if such an application had

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been made it would have been unavailing, the bill will not be dismissed on this ground.

The trustees of a Roman Catholic church organized under Pub. Sts. c. 38, §§ 48–50 (R. L. c. 36, §§ 44–46) have complete control of the corporate doings, and no other communicant or member of the corporation or of the parish can take part in the corporate action.

It is within the power of a religious society organized under our statutes to devote its general funds to the aid of other churches or religious societies or to home or foreign missions. Thus it is within the general scope of the corporate powers of a Roman Catholic church organized under Pub. Sts. c. 38, § 48, (R. L. c. 36, § 44,) to transfer a part of its funds to a new parish set off from itself.

BILL IN EQUITY, filed as amended July 31, 1903.

The Superior Court made a final decree dismissing the bill with costs as stated in the opinion; and the plaintiffs appealed.

R. F. Raymond, (*C. Mitchell* with him,) for the plaintiffs.

C. W. Clifford, for the defendants.

BARKER, J. The plaintiffs are thirteen members of the Roman Catholic church, identified in the matter of attendance upon divine worship, the ceremonies of the church and church discipline, with the body of Roman Catholic priests and laymen commonly called the Church of St. John the Baptist in New Bedford. They bring the bill in behalf of themselves and all others having like ground of complaint. The issues raised by the pleadings have been heard by a master under a rule requiring him to find and report the facts. No exceptions were taken to the report, and the court below having entered a final decree dismissing the bill with costs to the defendants, the cause is before us upon the plaintiffs' appeal from that decree.

The principal defendant is a corporation formed on June 4, 1888, under the provisions of Pub. Sts. c. 38, §§ 48, 49, 50, with the corporate name of "The Corporation of the Church of St. John the Baptist in New Bedford." The defendants Harkins, Doran, Neves, Pitta and Rogers are members of that corporation. The other two defendants are banks holding on deposit funds of the corporation. The defendant Harkins is the Roman Catholic bishop of the diocese of Providence within the territorial limits of which diocese New Bedford is situated. The defendant Doran is vicar general of the diocese. The defendant Neves is the pastor of the Church of St. John the Baptist. The defendants Pitta and Rogers are laymen and communicants of that church. The five persons last mentioned are the trustees of the corporation and Neves is the treasurer.

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The alleged ground of complaint is that the corporation is about to pay over and transfer a part of the funds now held by the corporation to the parish of Our Lady of Mount Carmel, a recently created Roman Catholic parish in New Bedford. This separate parish was constituted on September 5, 1902, by the bishop, acting in conformity with the usages and law of the Roman Catholic church, by dividing the parish of St. John the Baptist, and setting off therefrom, as the parish of Our Lady of Mount Carmel, all the Roman Catholics in New Bedford speaking the Portuguese language as their mother tongue and residing in New Bedford south of a certain line.

The bill as first amended alleged in substance that the whole fund was one accumulated by the Church of St. John the Baptist, by the gifts and donations of its members and communicants, and the gifts, bequests and donations of other friends of the church, for the purpose of erecting a new and enlarged church edifice in and for the parish and Church of St. John the Baptist, which fund is held by the trustees of the corporation but in trust for the Church of St. John the Baptist; and that the proposed transfer and payment of a part of the fund would be contrary to the express object for which the fund was given and would be an unlawful and unauthorized disposition of the fund. By another amendment the plaintiffs allege in substance that certain further funds derived from pew rents and various other sources have been received by the trustees and are held by them by virtue of their office, and have been mingled by them with the funds referred to as having been paid for the specific purpose of building a new church edifice for the parish of St. John the Baptist, and that all of the funds, though subject to the power and control of the trustees, are nevertheless in trust for the Church of St. John the Baptist. Besides the prayer for an injunction forbidding the proposed transfer, the plaintiffs ask for a decree that all of the funds belong to the corporation of the Church of St. John the Baptist in New Bedford, and that they can be used only for the purposes of the Church of St. John the Baptist.

It appears from the master's report that while the corporation has received moneys which the donors raised or gave for the express purpose of building a new church edifice, yet if

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that part of the fund which is due to moneys so raised or given is subject to a trust for that specific purpose, the proposed payment to the new parish will not affect such trust fund but will leave it intact. This state of the facts would require a decree for the defendants but for the last amendment to the bill.

Under that amendment the plaintiffs now contend that the fund "can only be used for the purposes of the Church of Saint John the Baptist," apparently meaning by this expression, which is the substance of one of the prayers of their bill as finally amended, the plaintiffs and all other Roman Catholics of New Bedford speaking the Portuguese language as their mother tongue, and not living in the territorial limits of the new parish of Our Lady of Mount Carmel, regarded as a church distinct from all other churches. In support of this contention they make the claim that the five individual defendants who hold office as trustees of the corporation are not its only members, but that the plaintiffs themselves and all other like communicants identified with religious worship at the Church of St. John the Baptist are such members, and that the trustees are merely the governing body of the corporation.

While the bill does not show that the plaintiffs, before resorting to the courts, sought redress from the corporation itself or from its officers, the bill was not demurred to; and the master finds that if such application had been made it would have been unavailing. See *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495.

The master also finds that upon the division of the parish the bishop determined that a division of the property held by the corporation should be made, and ordered that such division should be made by directing the treasurer of the corporation to pay out of its funds to the new parish the amount of the proposed payment; that following this order a meeting of the trustees was called, at which three of the trustees, the pastor and the two laymen, in the absence of the bishop and the vicar general the two other trustees, voted that it was the sense of the board that it would be unjust and unwise to give any of the moneys to the new parish; that subsequently, on March 20, 1903, at a new meeting attended by all the trustees, the vote authorizing and directing the proposed payment was passed by a

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majority of the trustees, the bishop, the vicar general and one layman voting in the affirmative and the pastor and the other layman in the negative; and that by the canonical law the pastor, or any one of the plaintiffs or any member of the parish had a right of appeal from the action of the bishop to superior tribunals of the Roman Catholic church, and that no such appeal has been instituted. The failure to institute such an appeal not having been made a ground of defence to the bill, we have no occasion to consider whether a defence could be founded upon the failure to institute or prosecute an appeal.

It is to be noticed that except as to the proposed payment the plaintiffs' contentions raise moot questions only, there being no allegation or finding of any intention on the part of the corporation to dispose of any other portion of its property in any way which would be contrary to the plaintiffs' view of its duty.

We do not find it necessary to determine whether the plaintiffs are in any sense members of the corporation. It is plain that under the provisions of Pub. Sts. c. 38, §§ 48–50, and of R. L. c. 36, §§ 44–46, now in force, no persons but the trustees have any part or voice in the corporate doings. A vote duly passed by the trustees is a vote of the corporation. No other communicant or member of the congregation or of the parish can take part in the corporate action. The vote at the earlier of the two meetings called to consider the proposed payment did no more than to express the feeling of the board at that time, and the formal direction to the treasurer to make the payment given by the vote passed at the later meeting, must stand as the final and authoritative action of the corporation upon the subject.

We find nothing in the master's report to justify a finding that, aside at least from moneys raised or given for the specific purpose of building a new church edifice, the funds now in the hands of the corporation have been so raised or are so held as to place any limitation upon their application beyond that which attaches to the general funds of any religious society. The only remaining question, therefore, is whether the purpose to which the corporation in due form has decided to apply its property by the proposed payment is one within the general scope of the corporate powers of an incorporated Roman Catholic church.

Of this we have no doubt. The master's report shows that the

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purpose is one consonant with the usages of that church in this country. There can be no question that it is within the power of any religious society to devote its general funds to the aid of other churches or religious societies or to home or foreign missions.

Decree affirmed.

PROVIDENCE, FALL RIVER AND NEWPORT STEAMBOAT COMPANY *vs.* CITY OF FALL RIVER & another.

SAME *vs.* CITY OF FALL RIVER.

JOHN KEOGH *vs.* SAME.

SAME *vs.* SAME.

CHARLES F. BORDEN & another *vs.* SAME.

SAME *vs.* SAME.

Bristol. October 25, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Damages, For property taken under statutory authority. *Fall River*. *Grade Crossing Acts*. *Way*, By prescription. *Statute*, Construction.

St. 1900, c. 472, providing for the abolition of certain grade crossings in Fall River, did not on its passage transfer the title to the lands and rights in land appropriated thereunder to the public use, and the time of the taking from which interest is to be computed in assessing damages, on the petitions of the owners of such lands and rights, is the date of the filing of a plan and recording of a statement in the registry of deeds signed by the mayor of the city and the engineer of the railroad company.

Under St. 1900, c. 472, providing for the abolition of certain grade crossings in Fall River, interest on damages for the taking of lands and rights in land is to be computed from the time of the taking and not from the time of the subsequent entry on the land for making the authorized changes. R. L. c. 48, § 13, in regard to the assessment of damages from the relocation or alteration of a highway has no application.

After land of a railroad company has become a public highway by prescription an owner of adjoining land cannot acquire a private right of way by adverse use in travelling over it.

The requirement of the commissioners whose report was enacted as law by St. 1900, c. 472, providing for the abolition of certain grade crossings in Fall River, that the side walls of Central Street from Davol Street to Pond Street be raised by suitable masonry to a height of four feet above the grade of the street, was intended for the protection of travellers and not to cut off landowners from access to the street if they chose to construct passageways opening into it, and a ruling of an auditor that damages to adjoining land should be assessed as if

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the owners upon request were to have openings made, where reasonable, in the north wall on Central Street, for access to their property, is correct.

In assessing damages to real estate in which there are leasehold interests and the reversion is owned by a corporation, taken for public purposes under a grade crossing act, the rule is to ascertain the total amount of damages sustained by the owners, "estimating the same as an entire estate and as if it were the sole property of one owner in fee simple," and then to apportion the damages among the several parties "entitled thereto, in proportion to their several interests and to the damages sustained by them, respectively," as provided in R. L. c. 48, § 22, in reference to proceedings under § 20 of that chapter.

In assessing damages to real estate taken for public purposes under a grade crossing act, if the petitioner is a mortgagor and the mortgagee waives his right to be heard, the petitioner as mortgagor is entitled to recover the damages.

SIX PETITIONS, filed July 16 and 17, 1901, and January 23, August 11 and December 11, 1902, for damages from changes required to abolish grade crossings in Fall River under St. 1900, c. 472, and the statutes referred to therein.

The cases were referred to Charles W. Clifford, Esquire, as auditor. He reported that the gross damage was $24,000, and apportioned $18,000 to the Providence, Fall River and Newport Steamboat Company, $4,000 to Keogh, and $2,000 to Borden and Remington, with interest in each case from January 1, 1902, the date of the taking. In the Superior Court *Bell*, J. refused to make various rulings requested in the form of exceptions and objections to the auditor's report, and ordered that the auditor's report be confirmed and that judgments be entered in accordance therewith. He reported the cases for determination by this court. If any rulings of the judge were erroneous, such judgments were to be entered and such disposition of the cases was to be made as this court might order; otherwise, judgments were to be entered as ordered by the judge.

A. J. Jennings & J. M. Morton, Jr., for the Providence, Fall River and Newport Steamboat Company.

E. Higginson, (*J. W. Cummings* with him,) for Keogh.

A. S. Phillips, for Borden and Remington.

H. A. Dubuque, for the city of Fall River, (*F. S. Hall* with him, representing the Old Colony Railroad Company, joined as respondent in the first case.)

KNOWLTON, C. J. One of the most important questions in these cases arises in construing the St. of 1900, c. 472, which is an act providing for the abolition of grade crossings in Fall

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River. In *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 183 Mass. 535, it was held that this was special legislation, adopting and establishing a particular scheme for a public improvement, which superseded the action of the court, and finally determined the details of the changes to be made in the interest of the general public. The question now before us is whether the statute worked a change of the title to the rights and lands which were appropriated to the public use, or whether it required an additional proceeding as a preliminary to such a change. Upon the theory of the petitioners the statute not only settled the rights of the public and of property owners as to what was to be done, but it was in law the taking of the title to such land as was appropriated and such private rights as were abridged or destroyed in the public interest, so that the time limiting the bringing of petitions for damages began to run, and the right to receive interest on the amount to be paid accrued, on the passage of the act. It is argued correctly that the rights of the parties were not made subject to the discretion of the mayor and the engineer of the railroad company, which they could exercise by filing or refusing to file the plan and the statement of taking in the registry of deeds. No doubt the rights of all parties became fixed so far as the final adoption of the scheme was concerned, as soon as the act was passed, and it then became the duty of the mayor and engineer to file, within a reasonable time, a plan and the statement of lands and rights taken. This duty they could have been compelled to perform. But the statute contemplated the possibility, if not the desirability, of acquiring a part or all of the lands by purchase, and provided for such purchases. This involved an implication that the title to land purchased would pass by the deed of conveyance, and not by a taking. It was intended, therefore, that there should be an opportunity to attempt an acquisition of title by purchase before there was a taking, and, upon a failure in the attempt, that there should be a taking by the mayor and the engineer, which would work a change of title and fix the time from which the statute of limitations would begin to run and the right to receive interest would accrue. While it might be possible to construe the statute in accordance with the petitioners' contention, we think it better to hold that the Legis-

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lature did not intend to change the ownership of property by the enactment of the statute, without the subsequent action called for, which was to be a matter of record in the registry of deeds. If this is a correct construction of the statute as to the taking of the lands, the same construction should be given to that part of it which relates to the acquisition of rights in land, the general title to which is left in private owners.

The respondents' contention that interest is to be reckoned from the date of the entry upon the land to make the changes, instead of from the date of the taking, is not well founded. The reason for the provision of the R. L. c. 48, § 13, relied on by the respondents, is not applicable to the assessment under this statute, which statute in itself shows a final determination that the work shall be done, and under which no land of the petitioners was taken, but only certain rights in land. See *Hay* v. *Commonwealth*, 183 Mass. 294.

In regard to the discontinuance of Water Street, the contention of the first petitioner as stated in the report, is "that although its land did not abut on the discontinued portion of Water Street it had by open, adverse and uninterrupted user for more than twenty years acquired a private right of way over the land of the railroad company from its land to the discontinued portion of Water Street and that, therefore, the discontinuance of that street was a special damage to it." The finding of the auditor that the public had acquired a right of way by prescription in the land between Central Street and Water Street was well warranted, and after this land had become a public highway by the acquisition of such a right, the petitioner could not acquire a private right of way over it by adverse use in travelling along it. The ruling of the auditor upon this point was correct.

The requirement of the statute, following the report of the commissioners, was that the side walls of Central Street from Davol Street to Pond Street be raised with suitable masonry to a height of four feet above the grade of the street. This requirement was for the protection of travellers along the street from the danger of falling upon the adjacent land below. It was not intended to cut off landowners from access to the street if they chose to construct passageways opening into it.

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Warner v. *Holyoke*, 112 Mass. 362. The ruling of the auditor was correct, that damages were to be assessed "as if upon request of the petitioner or its tenants, they were to have openings made where reasonable in the north wall on Central Street for access to their property." This sufficiently covered the contention of the respondents that they were "to have it removed altogether in case provisions were made by the abutter to make travel safe wherever his land is lower than the grade of Central Street." This could be done if the land was so used as to make so complete an opening reasonable; otherwise it could not. There was no ground for the respondents' contention that the walls were to stop short of Pond Street. The report adopted by the statute is explicit in that particular, and is binding upon the parties.

The allowance of $600 for shoaling the water in the petitioner's dock, which was made to the lessees Borden and Remington, called for an increase of the entire damages, to the owner and the lessees, which were being assessed in the trial of the several cases together. This allowance, having been made to the lessees, was deducted from the aggregate sum, and thus it diminished by so much the allowance to which the owner was fairly entitled. This sum would have been added to the other allowance for the entire damages, except that the auditor understood the counsel of the owner to waive any claim to it. We are of opinion that a fair construction of the language of the counsel is that, as between the owners and the lessees, he did not care to claim it in the apportionment, and not that, if it was allowed to the lessees, he consented that it should be deducted from the damages to which his client was entitled. We are of opinion that this sum should be added to the $24,000 allowed as the gross damages, thus relieving the owner from a deduction from the $24,000 on account of the loss of the lessees from shoaling the dock, and thereby increasing by $600 the amount allowed to the owner in the apportionment. See *Manson* v. *Boston*, 163 Mass. 479.

The ruling that these proceedings are governed by R. L. c. 48, § 20, was correct. Here was one estate with leasehold interests in certain parts of it, and the reversion in all of them owned by a single corporation. The rule for the assessment of

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damages in such cases is to ascertain the total amount of damages sustained by the owners, "estimating the same as an entire estate and as if it were the sole property of one owner in fee simple," and then to apportion the damages among the several parties "entitled thereto, in proportion to their several interests and to the damages sustained by them, respectively," as stated in R. L. c. 48, § 22, in reference to proceedings under § 20. *Edmands* v. *Boston*, 108 Mass. 535. *Boston* v. *Robbins*, 121 Mass. 453. *Burt* v. *Merchants' Ins. Co.* 115 Mass. 1.

The Union Trust Company, holding a title as mortgagee under a trust deed, having waived its right to be heard, the petitioner as mortgagor was plainly entitled to recover the damages.

There was sufficient evidence to warrant an inference that the city had notice of the lease to Borden and Remington before the taking was filed. If there had been no lease, the damage to the whole property as it was at the time of the taking, including the buildings, would have been assessable.

The assignment of the lease from Keogh to one Brown was rightly held to be a mortgage, and, upon the disclaimer of the mortgagee, the damage rightly was awarded to Keogh.

The exceptions of the respondents which relate only to the apportionment of damages between the different petitioners are immaterial. Other exceptions that have not been argued, either orally or upon the respondents' brief, we do not consider. Under the report of the judge of the Superior Court, the auditor's report is to be confirmed, and judgment entered in accordance therewith, except that the total damages are to be increased by the sum of $600, and that sum is to be added to the amount allowed in the apportionment to the owner of the fee.

So ordered.

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GEORGE CUNNINGHAM *vs.* ATLAS TACK COMPANY.

Bristol. October 25, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

In an action by an employee in the tack factory of the defendant for the loss of a finger through the alleged negligence of the defendant's superintendent, it appeared, that the plaintiff was called from his regular work to help in loading a rivet machine upon a wagon, that the machine weighed one thousand pounds and consisted of a pedestal four feet high with a balance wheel at the top, extending a foot and a half higher, and a cross piece, that the superintendent in charge of the loading knew the nature of the machine of which the plaintiff was ignorant, that when the balance wheel revolved two sharp edges were brought together, that at first the wheel was tied with a wire, but, while the men were attempting to place the machine on the wagon, it fell to the ground wrong side up, and the wire holding the wheel was broken, that the superintendent, without waiting to see whether the wheel still was tied, ordered a board put under the machine and then told six or eight men including the plaintiff to take hold and lift it into the wagon, directing as many as could to take hold of the board and the rest to get hold of the machine wherever they could, that there were more men than could get hold of the machine readily, that the plaintiff took hold of the board with his right hand and put his left hand on the end of the machine, that as the men lifted the machine to the wagon the plaintiff was crowded and lost his hold, and, when his left hand came clear, one of his fingers was gone, having been cut off by the two sharp edges brought together by the revolving of the balance wheel. *Held*, that there was evidence on which a jury might find that the superintendent was negligent in ordering the men to lift the machine without making sure that the balance wheel was tied, and that this negligence was the proximate cause of the plaintiff's injury. The jostling of the men and the consequent loosening of the plaintiff's hold was an incident to be expected in lifting so high, so heavy and yet so small a machine, and was not the sole cause of the accident.

TORT by an employee in the defendant's tack factory at Taunton, for personal injuries described in the opinion. Writ dated June 30, 1902.

In the Superior Court *Wait*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

F. S. Hall & C. C. Hagerty, for the plaintiff.

R. Spring, for the defendant.

LORING, J. This is an action for the loss of a finger under the following circumstances. The plaintiff, who was an employee of the defendant, was called away from his regular work

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to help in loading certain rivet machines upon a wagon in a hurry. The first machine was placed on the wagon without trouble. The second, after being rolled to the tail board on rollers, fell while being lifted upon the wagon. The first count was a count at common law, and the second was under the employers' liability act. The presiding judge directed a verdict for the defendant on both counts.

The case was submitted on briefs. No adequate description of the machine is given in the bill of exceptions, and no explanation was made by counsel of the cut of the machine which is also before the court.

The machine weighed one thousand pounds, and consisted of a pedestal four feet high with a balance wheel at the top extending a foot and a half higher. Across the top of the pedestal and at right angles to it is a cross piece. Apparently (in some way not adequately described) this balance wheel, when the machine is in operation, brings two sharp edges together. If the balance wheel is not tied it apparently revolves on the machine's being moved, and on its revolving the sharp edges are brought together.

The evidence warranted a finding that when the moving of this machine was begun the balance wheel was tied, but that the wire with which it was tied was broken by the fall, and that after the machine fell one Lincoln, who was in charge of the work, without waiting to see whether the wheel was still tied or not (he testified that he did not know whether it was originally tied or not), ordered a board put under some part of the machine and then told the six to eight men engaged in loading the machine to take hold and lift it into the wagon, directing as many as could to take hold of the board and "the rest get hold of the machine wherever you can," in the language of one of the witnesses. The machine was then bottom up. There were more men than there was "room [for] to get hold of the machine readily." The plaintiff then undertook to help lift with his right hand on the board and his left hand on the end of the machine, where apparently the sharp edges come together when the balance wheel turns. As the men lifted the machine to the wagon the plaintiff was crowded and lost his hold. He felt that his finger was caught, and with the next lift his "hand came

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clear and the finger was gone,"— cut off by the two sharp edges put in motion by the revolving of the balance wheel. In the language of the superintendent on the stand, the plaintiff "had never had anything to do with the running of the machine upon which he was hurt, or any machine like it." The jury also were warranted in finding that Lincoln was a superintendent within the employers' liability act, and was acting as such.

We are of opinion that the jury were warranted in finding that it was negligent for Lincoln to order the men to lift the machine without making sure that the balance wheel was tied, and that this negligence was the proximate cause of the plaintiff's injury.

The jostling of the men and consequent loosening of the hold of the plaintiff under the circumstances was an incident to be expected in lifting so high, so heavy, yet so small a machine. We are of opinion that the defendant's contention is not well taken that this was something for which the defendant was not to blame and was the sole cause of the accident. Neither is the contention that the situation was as clear to the plaintiff as to the superintendent. The superintendent knew the nature of the machine, while the plaintiff was altogether ignorant of it.

The plaintiff has not argued that he can maintain his action at common law. The entry must be,

On the first count, exceptions overruled; on the second count, exceptions sustained.

JOSEPH BAKER *vs.* CITY OF FALL RIVER.

Bristol. October 25, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Way, Laying out of highway, defect in highway. *Automobile. Negligence*, On highway. *Law of the Road.*

Where the records of a city show that a report of the mayor and aldermen, that the common convenience and necessity require the laying out of a certain street, was accepted and approved by the board of aldermen, and that the report

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then was accepted by the common council, and that the board of aldermen concurred with the council in accepting the report, this shows a laying out of the street in accordance with law.

Semble, that an automobile is a carriage within the meaning of the highway act, R. L. c. 51, § 1.

A person is not precluded from recovering under the highway act, R. L. c. 51, for injuries from a defect in a highway dangerous to travellers in ordinary vehicles because when injured he was travelling in an automobile.

In an action against a city for injuries from an alleged defect in a highway, consisting of a rope stretched across from a stake at the side of a sewer trench in the middle of the street to a telegraph pole in the sidewalk, on the right hand side as the plaintiff was approaching in an automobile and at the farther end of the trench from the plaintiff, the defendant contended that the plaintiff was negligent in choosing the narrower opening to the right rather than the wider one at the left. There was no other vehicle in the immediate vicinity at the time. The judge instructed the jury that in considering the question of the plaintiff's due care they might have in mind the provisions of R. L. c. 54, § 1, commonly known as the law of the road. *Held*, that this instruction was right; that, although there was no other vehicle in sight and the plaintiff might have turned to the left without disobeying the statute, it was plain that other vehicles might approach and if so it would be the plaintiff's duty to keep to the right of the trench, and that the requirement of the statute was material, both upon the question of the plaintiff's due care in attempting to travel where he did, and upon the question whether there was a defect caused by negligence in obstructing one entire half of the travelled path.

In an action against a city for injuries from an alleged defect in a highway, consisting of a rope stretched across from a stake at the side of a sewer trench in the middle of the street to a telegraph pole in the sidewalk on the right hand side as the plaintiff was approaching in an automobile and at the farther end of the trench from the plaintiff, it appeared, that the plaintiff in attempting to pass to the right of the trench was struck by the rope, which he did not see until within two or three feet of it, and that he then tried to stop the machine and its speed was diminished when he struck the rope, that the rope was of a color not easily distinguishable and that no flag or other means of attracting attention to the presence of the rope was used. There was evidence that the plaintiff was proceeding slowly and carefully. *Held*, that on this evidence, with other evidence tending to show how long the obstructions had been in place and their nature and location, the questions whether there was a defect in the highway and whether the plaintiff was in the exercise of due care were for the jury.

TORT, by one injured while travelling in an automobile, by an alleged defect in Bedford Street in Fall River, consisting of a rope stretched across one side of that street from an iron stake at the side of a trench being opened in the middle of the street, to connect a house with a sewer, to a telegraph pole in the sidewalk. Writ dated June 6, 1903.

At the trial in the Superior Court before *Schofield*, J. the jury answered special questions, submitted to them by the judge, as

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follows: "1. Was the plaintiff in the exercise of due care? Yes. 2. Was the automobile running at the time of the accident at a speed exceeding ten miles an hour? No." The jury returned a verdict for the plaintiff in the sum of $175; and the defendant alleged exceptions, raising the questions stated by the court.

H. A. Dubuque, for the defendant.

A. S. Phillips, for the plaintiff.

BARKER, J. This is an action brought under the provisions of R. L. c. 51, § 18, to recover compensation for personal injuries suffered in consequence of an alleged defect in Bedford Street. This street had been used for public travel for more than thirty years, and was constructed with a macadam driveway for vehicles and with sidewalks and curbs on either side. The plaintiff was riding on the right hand side of the driveway, in an automobile which ran into a rope stretched above the driveway across a portion of it extending from the curb to a point near the centre of the street, and fastened at one end to a pole in the sidewalk and at the other end to an iron bar driven into the macadam.

1. The first question raised is whether the street had been laid out in accordance with law. The records showed a layout of the street by a report of the mayor and aldermen, that the common convenience and necessity required that such a street should be laid out, accepted and approved by the board of aldermen on August 22, 1871; that the report was accepted in the common council on August 24, 1871, and that the board of aldermen on September 4, 1871, concurred with the council in accepting the report. The defendant's contention is that the street was not a public highway because the votes of the common council and of the board of aldermen were only to accept the report and not the layout mentioned therein. The case of *Draper* v. *Mayor of Fall River*, 185 Mass. 142, is relied upon by the defendant in support of this contention. There the question was whether a sewer system had been adopted by the city, and the report which had been accepted and referred to a committee was merely a report of an engineer employed by the city to devise a system of sewerage. The action of the city in accepting the report of a mere employee and in referring it to a committee

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with authority to print the report in pamphlet form was not a laying out of the sewers comprised in the system, nor an adjudication that they were required by common convenience and necessity. In the present case the mayor and aldermen who reported the laying out of Bedford Street in 1871 were not acting as a committee but as a branch of the city government and were clothed with authority to take the first step in laying out public ways, by the making and filing of a report adjudicating that the way should be laid out. St. 1854, c. 257, § 14. The statutory phrase indicating the action to be taken by the inhabitants of a town, or by the legislative departments of a city government upon such a report in order to establish the way is "accepted and allowed." See Rev. Sts. c. 24, § 69; Gen. Sts. c. 43, § 65; Pub. Sts. c. 49, § 71; R. L. c. 48, § 71. The acceptance by one branch of a government of the action of another branch, when the effect of concurrence of action by both branches is to establish a new public work, indicates that the branch which accepts intends to allow the public work to be established. Accordingly a vote of the inhabitants of a town upon the report of its selectmen laying out a way, that the report be accepted, has been held to establish the way. *Harrington* v. *Harrington*, 1 Met. 404. We think the records concerning the laying out of Bedford Street showed its establishment as a public way for the care of which the defendant was responsible. See *Masonic Building Association* v. *Brownell*, 164 Mass. 306, 309.

2. The defendant requested an instruction that "the provisions of R. L. c. 51, § 1, do not apply to one driving an automobile, which is not a 'carriage,' within the meaning of that statute, but may be considered more like a 'machine.'" Upon the subject of this request the presiding judge said to the jury that he did not feel at liberty to instruct them that an automobile cannot be considered as a carriage, and that although the plaintiff was in one at the time still he was in the highway as a traveller in a mode of conveyance which, if the other elements of liability were established, would entitle him to recover.

Plainly an automobile is a vehicle which can carry passengers or inanimate matter, and so is such a carriage as the decision in *Richardson* v. *Danvers*, 176 Mass. 413, 414, said that the Legislature had in view in the use of that word in the statute. The

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section referred to in the request deals with the state of repair in which ways are to be kept. In the present case the alleged defect was one which would be dangerous to ordinary vehicles. Therefore we now have no occasion to consider whether roads must be kept in such a state of repair and smoothness that an automobile can go over them with assured safety. It now has been settled that a traveller is not precluded from recovery under the statute by the fact that when the accident occurred he was riding upon a bicycle if the defect was one dangerous to ordinary travel. *Spring* v. *Williamstown*, 186 Mass. 479. The automobile is a vehicle in common use for transporting both persons and merchandise upon public ways, and its use is regulated by statute. Sts. 1902, c. 315; 1903, c. 473. We think that the plaintiff was not precluded from a recovery because of the nature of the vehicle in which he was riding, and that the instruction to that effect was right, and that the defendant was not harmed by the omission to charge in accordance with the request stated.

3. At the plaintiff's request the jury were instructed that in considering the question of due care they might have in mind the provisions of R. L. c. 54, § 1, commonly known as the law of the road. We are of opinion that there was no error in this instruction. Although as there was no other vehicle in the immediate vicinity, and the plaintiff might have turned to the left without disobeying the statute, it was plain that other vehicles might approach and that if so it would be the plaintiff's duty to keep to the right of the workmen who were plainly to be seen engaged in opening a trench near the middle of the carriage way. The defendant contended that the plaintiff was negligent in choosing the narrower opening to the right rather than the wider one to the left. Under these circumstances the statutory requirement that when persons meet each shall seasonably drive to the right of the middle of the travelled path properly could be taken into account upon the question of the plaintiff's due care in attempting to travel where he did, and upon the question whether there was a defect caused by negligence in obstructing the whole of one half of the travelled path. The instructions given did not in any way imply that for the plaintiff to have kept to the left would have been to violate the provision of the statute cited. See *Norris* v. *Saxton*, 158 Mass. 46.

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4. We are of opinion that the questions whether the way was defective and whether the plaintiff was in the exercise of due care were for the jury. There was evidence tending to show that the rope was of a color not easily distinguishable and that no flag or other means of attracting attention to the presence of the rope was used. The plaintiff testified that he did not see the rope until within two or three feet of it, that he then tried to stop the machine but "it was no use," and that the speed was diminished when he struck the rope. The obstructions to travel were caused by the operations of persons who were acting under a permit issued by the proper officials of the city, and this evidence with that tending to show how long the obstructions had been in place and their nature and location and the general location and use of the street justified a finding that they were dangerous to travel and that the danger might have been avoided by reasonable care on the part of the defendant. While the evidence as to the speed of the plaintiff's vehicle was contradictory, there was evidence that he was proceeding slowly and carefully.

Exceptions overruled.

JOSEPH TETRAULT & others *vs.* DELPHINE FOURNIER & others.

Bristol. October 25, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, Laches. *Equity Pleading and Practice.*

A bill to redeem real estate from a foreclosure under a mortgage, voidable because of fraud and mismanagement by the mortgagee while in possession, cannot be maintained if filed more than ten years after the foreclosure, of which the mortgagor had knowledge during the whole of that period.

Where laches appears on the face of a bill in equity that defence can be set up by demurrer.

It is not a sufficient excuse for the laches of the heirs at law of a mortgagor, in delaying for ten years to bring a suit in equity to redeem real estate from a foreclosure alleged to be voidable by reason of fraud and mismanagement by the mortgagee while in possession, that "the plaintiffs have been delayed in the bringing of this action by the negligence and misconduct of certain attorneys whom they have employed to protect their interests therein, but who have

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either done nothing or have so unskilfully managed the said action that the plaintiffs have wholly failed to secure the relief to which they are and were entitled; said attorneys being at no time able to respond in damages for their said negligence and misconduct." The foregoing allegation in a bill in equity otherwise bad for laches is too general to put on the defendants the burden of a trial.

BILL IN EQUITY, filed May 18, 1903, by the heirs at law of Julia Tetrault, deceased intestate, to redeem certain real estate in Fall River from a foreclosure under a mortgage, and for an accounting.

The bill alleged, that on February 19, 1885, Julia Tetrault made a mortgage of the premises to the Warren Institution for Savings, doing business at Warren in the State of Rhode Island, to secure the payment of a loan of $13,000 and interest thereon at the rate of six per cent per annum; that before July 30, 1887, $1,000 had been paid on account of the principal, and all interest then due had been paid; that on July 30, 1887, the Warren Institution for Savings entered on the premises for the purpose of foreclosing the mortgage, and collected all rents and profits of the premises until September, 1887, when it assigned the mortgage to the Fall River Five Cents Savings Bank, one of the defendants in this suit; that thereafter the defendant savings bank collected all the rents and profits until January 14, 1893, when it foreclosed its mortgage by a sale of the premises, which it purchased for $10,500; that the defendant savings bank during the time of its management of the property before the foreclosure sale wrongfully and fraudulently managed the premises in such a way as greatly to diminish the amount that would have been received as rents therefrom had the property been managed properly, and greatly damaged the premises by neglecting the necessary care thereof; that within the three years next ensuing after July 30, 1887, and later, but before the foreclosure, the plaintiffs and their privies in title repeatedly demanded of the defendant savings bank an accounting showing the amount collected as rents and the amount remaining due on the mortgage; that the defendant savings bank never rendered an account of the rents, but always met the plaintiffs' demand therefor with a statement that $12,000 and interest was due on the mortgage, the sum of $12,000 being more than was due on the mortgage at any time it was held by the defendant savings

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bank, and more than it paid for the assignment thereof; that on or about February 1, 1893, the defendant savings bank conveyed the premises by a quitclaim deed to the defendants Slade and Huard, and on the same day the defendants Slade and Huard conveyed the premises by a warranty deed to one Joseph Fournier who executed a mortgage of the premises to the defendant savings bank, and also a second mortgage to John P. Slade and Leonard N. Slade, copartners under the name of John P. Slade and Son, which second mortgage was discharged on or about March 1, 1900; that Joseph Fournier died testate on May 24, 1901, and devised all of the premises to his wife, the defendant Delphine Fournier, for her life, with remainders over in certain portions thereof, described in part in his will by metes and bounds, to the defendants, Elzear Fournier, Achille Fournier, Angelina Bourget, Amedee Fournier, Albert Fournier, Leda Hebert and Nelson Fournier; and that the defendants or their privies in title were in possession of the premises from January 14, 1893, to the time of the filing of the bill, and received the rents and profits thereof; praying, 1, that the foreclosure sale might be set aside and that any conveyances made under and by virtue of it might be decreed to be void, and that the defendants might be ordered to make such deeds and conveyances as might be necessary to restore the title to the premises to the same situation as it was before the sale; 2, for an accounting for the rents, profits and necessary expenditures of or on account of the premises from July 30, 1887; and 3, that the plaintiffs might be allowed to redeem the premises upon payment of the amount which might be found due upon a just and true accounting, which amount the plaintiffs offered to pay.

The defendants demurred; and the plaintiffs on January 14, 1904, filed by leave of court an amendment to their bill, a portion of which is quoted in the second paragraph of the opinion of the court, and which concluded with the following paragraph referred to in the third paragraph of the opinion: "15. The plaintiffs have from 1895 to December 1901 been delayed in bringing this action by reason of certain documentary evidence therein being beyond their control, said evidence being in the hands of one of said attorneys who refused without cause to surrender the same but put the plaintiffs off from time to time with the

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assurance that he would try their said cause." The defendants demurred to the amended bill, alleging as causes of demurrer want of equity and laches. The Superior Court made a decree sustaining the demurrer and dismissing the bill. The plaintiffs appealed.

A. G. Weeks, for the plaintiffs.

H. A. Dubuque, for the Fall River Five Cents Savings Bank.

L. E. Wood, for the defendant Delphine Fournier and others, submitted a brief.

D. F. Slade, for the defendants Leonard N. Slade and John B. Huard, also submitted a brief.

LORING, J. The case made by the bill as originally filed (assuming that the allegations were sufficiently precise to state a case) is that both foreclosures are voidable because of fraud and mismanagement of the mortgagee while in possession, and of a refusal to account on demand. It is not pretended that the mortgagor or her heirs, the present plaintiffs, were ignorant of the fact that the mortgage had been foreclosed. It appears that more than ten years have elapsed since the date of the later foreclosure. That convicts the plaintiffs and their ancestor of laches. *Learned* v. *Foster*, 117 Mass. 365. *Fennyery* v. *Ransom*, 170 Mass. 303. See also *Bancroft* v. *Sawin*, 143 Mass. 144. Where laches appears on the face of the bill, the defence can be set up by demurrer. *Snow* v. *Boston Blank Book Manuf. Co.* 153 Mass. 456, 457.

This defect has not been cured by the amendment. To escape from the imputation of laches it was incumbent on the plaintiffs to allege such facts as showed an excuse. The allegation here does not go far enough. It is: "The plaintiffs have been delayed in the bringing of this action by the negligence and misconduct of certain attorneys whom they have employed to protect their interests therein, but who have either done nothing or have so unskilfully managed the said action that the plaintiffs have wholly failed to secure the relief to which they are and were entitled; said attorneys being at no time able to respond in damages for their said negligence and misconduct." Such an allegation is too general a one to put the defendants to the burden of a trial. The plaintiffs may have been delayed without being excused from bringing this suit. The allegation

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here is like a general allegation of fraud, which it is well settled is not enough to put on a defendant the burden of going to a trial. As to this, see *Nye* v. *Storer*, 168 Mass. 53, where the demurrer was a general demurrer; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685. See also *Nichols* v. *Rogers*, 139 Mass. 146; *Garst* v. *Hall & Lyon Co.* 179 Mass. 588; *Fogg* v. *Blair*, 139 U. S. 118; *Van Weel* v. *Winston*, 115 U. S. 228; *United States* v. *Atherton*, 102 U. S. 372, 374.

The allegations in the fifteenth paragraph also are open not only to this objection but to the further objection that they do not cover three years and four months of the ten years or of the twelve years, as one or the other method of foreclosure is taken to be under attack.

It is not necessary in this case to consider the cases relied on by the plaintiffs, *Denton* v. *Noyes*, 6 Johns. 296, *Dinwiddie* v. *Self*, 145 Ill. 290, *Whitridge* v. *Whitridge*, 76 Md. 54, *Boing* v. *Raleigh & Gaston Railroad*, 88 N. C. 62, or those relied on by the defendants, *Ayres* v. *Morehead*, 77 Va. 586, *Callaway* v. *Alexander*, 8 Leigh, 114, *Ives* v. *Sargent*, 119 U. S. 652.

Decree affirmed.

MARGARET GARRY *vs.* JOHN GARRY.

Essex. November 1, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Deceit. Husband and Wife. Dower.

A married woman may maintain an action of tort for deceit against the brother of her husband for a false representation that the plaintiff's husband was to receive one half of the proceeds from the sale of certain real estate owned in common by the two brothers, whereby the plaintiff was induced to release her inchoate right of dower in one undivided half of the real estate, when in fact the plaintiff's husband by a previous secret conveyance had released his interest in the real estate to his brother and was to receive no part of the purchase money.

A married woman, if induced to give up an inchoate right of dower in certain real estate by false and fraudulent representations, has been deprived of a valuable right in property and is entitled to damages.

TORT, for certain alleged false and fraudulent representations, as stated in the opinion. Writ dated February 5, 1903.

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The defendant demurred to the declaration. In the Superior Court *Holmes*, J. sustained the demurrer, and, as the plaintiff did not wish to amend, gave judgment for the defendant. The plaintiff appealed.

J. P. Sweeney, for the plaintiff.

W. J. Bradley, for the defendant.

KNOWLTON, C. J. This is an appeal from an order sustaining the defendant's demurrer to the plaintiff's declaration, and from a judgment for the defendant. The declaration is in tort for deceit, the averment being that the defendant and his brother, the plaintiff's husband, were tenants in common of certain real estate, each owning an undivided half thereof, and that they conspired to defraud and deprive the plaintiff of her rights in the property by the making of a quitclaim deed from her husband to the defendant, transferring his share, and by then selling the property and concealing from the plaintiff the previous conveyance from her husband to the defendant, and falsely and fraudulently representing to her that he was still the owner of an undivided half of the property, and that upon the sale which had been made, one half of the purchase money was to go to him. She also avers that, relying upon these false representations, she was induced to sign a deed releasing her right of dower and all her rights in the property, when in fact her husband was not then the legal owner of any interest in it, and no part of the purchase money was coming to him.

The demurrer is general, with only two grounds stated on which it rests. The first is that there is no averment of a representation that she was to receive any portion of the proceeds of the sale, and that therefore the alleged representations are collateral and immaterial, and do not constitute a sufficient inducement to influence the plaintiff's action, and that she suffered no damages. The second ground is that the representation in regard to the receipt of a part of the proceeds of the sale by the plaintiff's husband does not purport to state an existing fact, but is merely promissory.

The declaration is not made with the technical formality of an ordinary declaration for deceit, but we are of opinion that with a proper interpretation of its meaning, it is in substance sufficient. It avers false representations as to the state of the

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title, and as to the nature of the sale in its relation to the plaintiff's husband and to the disposal of the proceeds, which induced her to believe that he was to receive one half of the price, when in fact he was to receive nothing. We do not consider such representations immaterial, or insufficient to constitute an inducement which might lead a wife to release a valuable interest in property for the benefit of her husband, and perhaps, through him, for her own benefit. It was such an inducement as is operative upon the mind of many a married woman almost every day. The fact that the money was not coming directly to her, does not imply that she was indifferent as to whether money was to be received by her husband.

Nor can it properly be said that the statement in regard to his right to one half of the proceeds was of a matter that was merely promissory. It was rather a statement of existing conditions and arrangements, in reference to which the deed of release was supposed to be made. The plaintiff, according to her averment, was falsely led to believe that a sale had been agreed to under which he was entitled to receive and would receive, if she signed a release, one half of the proceeds of the property, whereas the sale and arrangement that had been made were of a different kind.

It cannot rightly be contended that she suffered no damages from the release. An inchoate right of dower is a valuable right in property. *Burns* v. *Lynde*, 6 Allen, 305. *Davis* v. *Wetherell*, 13 Allen, 60. A similar right has been held to create an insurable interest in a building upon the real estate to which it pertains. *Doyle* v. *American Ins. Co.* 181 Mass. 139. If she was induced to give up such a right by the defendant's false and fraudulent representations, she is entitled to damages.

We cannot anticipate the evidence and determine the nature and degree of the proof that the plaintiff will be able to furnish, but giving the declaration the meaning which we think it was intended to have, it states a case which is proper for the consideration of a jury.

Judgment reversed; demurrer overruled.

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PATRICK F. BURKE *vs.* CITY OF HAVERHILL.

Essex. November 2, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Way, Defect in highway.

Cobble stones six inches in height supporting the edge of a concrete sidewalk, their upper surfaces being even with the line of the concrete walk, cannot be found to be a defect in the highway because a foot traveller coming upon the concrete walk from an intersecting street without a sidewalk has to step up six inches in the manner of stepping upon an ordinary curbstone.

TORT for personal injuries from an alleged defect in School Street in Haverhill at its intersection with Gardner Street in that city. Writ dated August 31, 1901.

At the trial in the Superior Court before *Sherman*, J., the judge refused the defendant's requests for rulings and submitted the case to the jury. The jury made the following findings in answer to questions specially submitted to them by the judge: "1. Did the plaintiff receive his injury on School Street? *A.* Yes. 2. On March 30, 1901, had Gardner Court, Lane or Street, become a public highway; — had it been open for actual general public use and travel, adverse, uninterrupted, and continuous, for more than twenty years? *A.* Yes."

The jury returned a verdict for the plaintiff in the sum of $1,600; and the defendant alleged exceptions, all but one of which the decision of the court has made immaterial.

E. S. Abbott, for the defendant.

F. H. Pearl, for the plaintiff.

BARKER, J. Many exceptions were taken by the defendant in this action to recover for personal injuries occasioned by an alleged defect in a highway in the defendant city. We find it unnecessary to consider any of them but the one to the refusal to order a verdict for the defendant on the ground that the evidence would not justify a finding that there was a defective way. The plaintiff received his injuries by stumbling over certain stones which were a part of and in the westerly edge of a concrete sidewalk on the west side of School Street a public way

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where it intersected Gardner Street which was also an open way but with no sidewalks, and which the plaintiff contended was a public way by prescription or a private way for which the defendant was responsible as for a public way, because it had posted no notices that Gardner Street was not a public way or that it was dangerous. The concrete sidewalk on School Street ended about two and one half feet southerly of the northerly line of Gardner Street continued in a direction to cross School Street, and at the line where it ended the concrete was about one and one half inches above the level of the natural ground. For six inches the concrete of the walk was unsupported upon its westerly edge, and from the termination of the six inches, for a space of two feet to the point of intersection of the northerly line of Gardner Street with the westerly line of School Street the concrete of the walk was supported by cobble stones so placed as to be in the westerly line of School Street. These stones were about six inches in height above the soil of Gardner Street, and their upper surfaces were even and in the line of the concrete walk. Their purpose was to hold the concrete of the walk in position, as a curbstone on the edge of a sidewalk next to the part of a street wrought for the travel of teams holds the material of a sidewalk in place. The cobble stones presented to a traveller about to pass upon the sidewalk from Gardner Street an even and regular surface making a step only six inches high, and of the same character as that which the traveller must surmount in going upon any curbed sidewalk from the part of the way devoted to the passage of teams and vehicles. Such steps are commonly found also wherever sidewalks are intersected by driveways or by other streets. If, as in the present instance, they are not more than six inches in height and present an even surface with a substantially level top not higher than the sidewalk, the material of which they are designed to hold in place, they are no more dangerous to the foot traveller than the ordinary curbstone, and we are of the opinion that a jury ought not to be allowed to find such a construction to be a defect in the way, any more than to find the ordinary curbstone a defect even when the step is one which a traveller coming to the sidewalk from an intersecting way has to surmount.

In *Flynn* v. *Watertown*, 173 Mass. 108, on which the plaintiff

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relies, the end of the cross walk might have been found upon the evidence to be a foot higher than the part of the street over which the plaintiff went to approach it and to have been uneven at its upper edge. In *George* v. *Haverhill*, 110 Mass. 506, the alleged defect consisted of plank two inches wide set transversely across the sidewalk at a point where a construction of brick and of gravel met, and standing in the centre of the walk two and one half inches above the general level of the walk and at the ends of the plank three inches. In *Marvin* v. *New Bedford*, 158 Mass. 464, the defect was a hole or depression in the sidewalk.

In *Redford* v. *Woburn*, 176 Mass. 520, and in *O'Brien* v. *Woburn*, 184 Mass. 598, the alleged defect was a water shut-off box rising in the sidewalk above its general surface, and in *Nestor* v. *Fall River*, 183 Mass. 265, the tree root projected above the level of the walk. In *Sampson* v. *Boston*, 184 Mass. 46, the pile of paving stones left on the edge of the walk was no part of the construction. If there had been no support for the concrete where it was supported by the cobble stones, its surface must have been so sloped as to make it more dangerous for a traveller than to descend or ascend a perpendicular step only six inches high, for if left unsupported the concrete would have disintegrated irregularly, which would have made the walk still more dangerous.

Exceptions sustained.

WILLIAM D. HOOE *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY & others.

GARRETT E. WELCH *vs.* SAME.

ERNEST LANE *vs.* SAME.

JOHN D. DONAHUE *vs.* SAME.

Essex. November 2, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Master and Servant. Negligence, Employer's liability. *Dynamite.*

In a contract, made by a contractor with a street railway company for laying a certain line of track, a provision, that the work shall be "subject to the direction and acceptance of the engineer" of the railway company, does not give the en-

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gineer any right of control or direction as to the execution of the work after indicating to the contractor what work is to be done and what materials are to be furnished, his only further right being to determine whether the work done by the contractor is acceptable, and the workmen employed are servants of the contractor and not of the railway company.

It is the duty of one employing men in blasting rocks with dynamite to make such an inspection after every blast as is necessary to guard against an accident from an unexploded portion of the dynamite remaining in one of the holes drilled to receive it, and he is liable for an injury caused by his failure to make such an inspection, although neither he nor his superintendent knew or had reason to believe that there was an unexploded charge of dynamite in any of the holes. It is enough that the master and his superintendent knew or ought to have known of such a possibility or probability of some of the dynamite remaining unexploded as to make an inspection necessary for the safety of the workmen.

A workman, employed by a contractor for work involving blasting, who is called the powder man and charges with dynamite the holes drilled by other men and explodes the charges, is not a superintendent within the meaning of the employers' liability act while he is doing this work, although he sometimes assists the superintendent in inspecting the holes after a blast to ascertain whether any dynamite has failed to explode, which is a work of superintendence for the purpose of securing to the workmen a safe place in which to work.

FOUR ACTIONS OF TORT against the Boston and Northern Street Railway Company, the Middleton and Danvers Street Railway Company and Loring N. Farnum, for personal injuries from explosions of dynamite, as stated in the first paragraph of the opinion, which occurred on a highway called the Old Salem Turnpike in North Andover, where the defendant Farnum was engaged in laying a line of track under a contract with the Middleton and Danvers Street Railway Company. Writs dated March 21 and April 16, 1902.

In the Superior Court all the cases were tried before *Lawton*, J., those of Hooe, Welch and Lane being tried together, and that of Donahue separately. In each of the cases the judge allowed the plaintiff to become nonsuit as to the defendant the Boston and Northern Street Railway Company, and ordered the jury to return a verdict for the defendant the Middleton and Danvers Street Railway Company. He submitted the cases to the jury against the defendant Farnum. In each case the jury returned a verdict for the plaintiff against the defendant Farnum, for Hooe and for Lane each in the sum of $1,500, for Welch in the sum of $4,000, and for Donahue in the sum of $2,700. The defendant Farnum alleged exceptions in each case.

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W. S. Knox, (*W. Coulson* with him,) for Farnum.

J. P. Sweeney, for the Middleton and Danvers Street Railway Company.

W. J. Bradley, for Hooe, Welch and Lane.

R. H. Sherman, for Donahue.

KNOWLTON, C. J. The first three cases were brought to recover damages caused by an explosion of dynamite on February 14, 1902, and the fourth was brought against the same defendants, to recover for a similar explosion which occurred on February 15, 1902. The first three cases were tried together in the Superior Court, and the four were argued together in this court. We will consider first the exceptions of the defendant Farnum in the first three cases.

The plaintiffs were admitted to have been in the exercise of due care. The explosion occurred in the morning, while the men were at work with pick and shovel, under the direction of the superintendent of the defendant Farnum, on the mass of earth and rocks where a blast had been exploded about half past three o'clock in the afternoon of the day before.

There was evidence which well warranted the jury in finding that the accident was caused by an unexploded piece of dynamite which was left in one of the holes after the blast of the day before, and that no such inspection was made by the defendant, or his superintendent, as should have been made to guard against such an accident. See *Hopkins* v. *O'Leary*, 176 Mass. 258.

The judge rightly declined to instruct the jury that the superintendent and workmen engaged in the work were servants of the Middleton and Danvers Street Railway Company, and not of the defendant Farnum. Upon the undisputed facts, under the agreement in writing between Farnum and the railway company, the management, control and direction of the men employed upon the work were in the defendant Farnum, and not in the railway company. It was a contract which gave Farnum the legal right to provide all the necessary labor and materials to complete the subgrading and ballasting of the proposed line of railroad. By the terms of the writing he was to have "the general direction of the work," and he could be displaced only in case the progress made on the work was "not satisfactory to the railroad com-

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pany," in reference to the time when he agreed to have it completed. The expression "subject to the direction and acceptance of the engineer" is similar to the common provision in building contracts, which gives the architect a right to represent the owner in determining whether the work is in accordance with the requirements of the contract. In this case the work to be done is described in the agreement very generally. Probably something as to the details of construction was understood to be left to the determination of the engineer or agent. But this did not give to the engineer any right of control or direction as to the execution of the work, after he had indicated to the contractor what was to be done and what materials were to be furnished. This further right was to determine whether the work done by the contractor was acceptable. The employees, being subject to the defendant Farnum's direction and control while engaged in working, were his servants, in reference to the rule which makes a master liable to third persons for the negligence of his servants. *Delory* v. *Blodgett*, 185 Mass. 126, and cases cited.

The third and fourth instructions requested were rightly refused. There might be a liability on the part of the defendant Farnum, even though neither he nor his superintendent knew or had reason to believe that there was an unexploded charge of dynamite there. It was enough to create a liability if they knew or ought to have known of such a possibility or probability that some of the dynamite remained unexploded as to make an inspection necessary for the safety of the workmen.

In one particular there was error in the instructions. Sheridan, who was called the powder man, was not a superintendent. He was a workman who charged the holes with dynamite and exploded the charges. He also sometimes assisted the foreman or superintendent Duggan in making an inspection after a blast, for the purpose of ascertaining whether any part of the dynamite had failed to explode. In this work of inspection, for the purpose of securing to workmen a safe place in which to work, he represented the defendant; for he was performing a part of the master's duty, for the proper performance of which the master was responsible to his servants, whether he performed it in person or delegated it to a servant. *Moynihan* v. *Hills Co.*

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146 Mass. 586. But, in charging the holes and exploding the blasts, he was doing the ordinary work of a servant, like the other workmen who drilled the holes. While it was a more important part of the work than drilling, it was work which would ordinarily be done by a servant and not by the master. Negligence in doing it would not subject the master to liability to a fellow servant injured by the neglect.

The defendant requested the judge to instruct the jury that if the "accident was caused by the negligence of Sheridan, who had charge of firing the blasts of dynamite, the plaintiffs cannot recover because said Sheridan was a fellow servant of the plaintiffs." The judge declined to give the instruction, but told the jury that if "there was any negligence in setting off the blast of dynamite on the day preceding the accident, either on the part of the foreman, Duggan, or the powder man, Sheridan," they might find for the plaintiffs. If there was negligence on the part of the superintendent in failing properly to supervise this part of the work, if supervision by the master or his superintendent was necessary, the defendant would be liable. But for the negligence of the workman himself he would not be liable to other servants. While this request went too far, inasmuch as there might have been negligence of Sheridan in inspection in which he undertook to perform the master's duty, and for which the master would therefore be liable, the request directed attention to his firing the blasts, and the instruction was given in reference to that. Another part of the instructions was given in reference to his possible negligence in inspection. We are of opinion that, by the exception to the refusal to give the instruction requested and to the instructions given, the defendant saved his rights in this particular, and that a new trial should be granted.

In the trial of the fourth case, brought by Donahue, it appeared that the superintendent Collins fired the blasts, and no such request for instructions was made, and no such exception was taken. For the reasons given in the other cases, the exceptions of the defendant in this case should be overruled.

In each of the first three cases the entry will be, defendant's exceptions sustained, and in the last case, defendant's exceptions overruled.

So ordered.

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ROLLIN B. HASTINGS *vs.* MARY T. LAWSON.

Essex. November 3, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Real Action. Pleading, Civil, General issue, Equitable defences.

A plea of nul disseisin in a real action puts in issue only the title, and under it the tenant cannot introduce evidence tending to show a right to have a contract in writing for the sale of the land to him reformed and to have specific performance of the reformed contract.

In a real action a tenant can introduce evidence of facts which would entitle him to relief in equity against the demandant's claim only when he has alleged such facts as an equitable defence under R. L. c. 173, § 28.

WRIT OF ENTRY, dated August 21, 1903, for a certain parcel of land with the buildings thereon on Main Street in Haverhill.

The tenant pleaded nul disseisin. In the Superior Court, *Holmes*, J., sitting without a jury, found for the demandant; and the tenant alleged exceptions.

N. C. Bartlett, for the tenant.

W. S. Peters & H. J. Cole, for the demandant.

BARKER, J. This writ of entry, to which the tenant pleaded nul disseisin, was tried by the judge without a jury. The demandant rested after having put in his deed. The tenant then offered in evidence a bond for a deed from the demandant to the tenant; also certain receipts signed by the demandant for amounts paid under the bond; also certain tax bills and bills for water rates paid by the tenant, and further offered to show that the tenant had paid the taxes and water rates from the year 1898. The tenant also offered to show that she was illiterate and unable to read and write, that the terms mentioned in the bond were different from those upon which she bought the premises, that she had complied with the terms upon which she alleged she had bought, and had been in possession from the date of the bond until the trial. All this evidence offered by the tenant was excluded. The tenant did not offer to show that she had complied with the terms of the bond as written.

The presiding judge ruled that under the plea the only question in issue was the demandant's title, and that the evidence

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offered by the tenant and excluded was not competent under her plea; and to this ruling the tenant excepted. After a finding for the demandant the case is here upon the tenant's exception to the ruling stated.

The plea, amounting now to the general issue, put the title in issue and the title only. The tenant could maintain her defence in two ways, namely, by failure of the demandant to show title in himself, or upon proof of title in the tenant. The evidence offered by the tenant did not tend to show that title was not in the demandant, nor that it was in the tenant. It tended to show that if she could have the written contract reformed and then have specific performance of it as reformed she would be entitled to have the demandant convey to her his title. If the evidence offered would entitle the tenant to be absolutely and unconditionally relieved against the demandant's claim of title, that evidence could not be received unless the tenant had alleged the facts as provided in R. L. c. 173, § 28. *Sherman* v. *Galbraith*, 141 Mass. 440, 442.

Exceptions overruled.

WILLIAM A. SCAPLEN *vs.* WALTER E. BLANCHARD.

Essex. November 3, 1904. — November 22, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Deed, Confirmatory. *Evidence*, Extrinsic affecting writings. *Practice, Civil*, Exceptions.

A purely confirmatory deed, given to replace one of the same tenor supposed to be lost, conveys no title and is merely evidence of the original deed. Oral evidence is admissible to identify the lost deed referred to and to show the time of its delivery, such evidence having no tendency to contradict or enlarge the meaning of the new deed.

The admission of incompetent evidence which did no harm to the excepting party is not a ground for exception.

WRIT OF ENTRY, dated February 26, 1901, for a parcel of land in Lynn.

The tenant pleaded nul disseisin. In the Superior Court the case was tried before *Pierce*, J., without a jury. The demandant requested the judge to rule: 1, that upon all the evidence

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the demandant was entitled to recover, and 2, that the demandant had as against the tenant the record title to the premises described in the writ. The judge refused to give either of these rulings, and made the following finding: [The judge finds] "so far as it is within the power of the court to find as a fact that the deed of February 28, 1877, recorded in Book 972 Leaf 231 was given to take the place of a deed which was delivered on April 23, 1873, previous to the deed of Edward Mahon to Walter E. Blanchard, and finds as a result of all the evidence that the demandant has not shown title."

The judge found for the tenant; and the case came before the court on a petition of the demandant under R. L. c. 173, § 110, to establish the truth of exceptions, and the report thereon of a commissioner appointed by this court, the purport of which is stated in the first paragraph of the opinion.

J. C. Batchelder, for the demandant.

W. H. Niles & E. M. Stevens, for the tenant.

KNOWLTON, C. J. The commissioner, appointed to consider the petition to prove exceptions, has made a report presenting a bill of exceptions agreed to by both parties, which is the original bill with slight amendments, and which he finds to be in all respects conformable to the truth. It also appears that the original bill was drawn in good faith, in the belief that it fairly set forth the rulings and the evidence, and the commissioner finds that the disallowance of it resulted from a misunderstanding between the parties. We therefore will consider the questions presented by the exceptions.

In 1871 the tenant in this action and one Hurley were the owners of a tract of land which included the demanded premises. By a quitclaim deed, dated April 2, 1873, they conveyed it to Edward Mahon. By a warranty deed dated April 23, 1873, Mahon conveyed a part of it, including the demanded premises, to the present tenant. In 1877 Hurley and the tenant executed to Mahon another deed bearing date February 28, 1877, describing the same premises that were described in their deed to him dated April 2, 1873, and containing in the *in testimonium* clause these words: "This deed is given to take the place of a deed given April 23, 1873, and is lost. Said lost deed being of the same tenor as this one." It is to be noticed that at this

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time the tenant, through Mahon's deed of April 23, 1873, had acquired a title to a part of the property described in these deeds to Mahon, which was later than his original title that he and Hurley conveyed to Mahon. The question at the trial was whether Mahon, by this confirmatory deed from Hurley and the tenant, if we may call it so, acquired, in addition to the original title which he had previously held, the new title of the tenant which he himself conveyed to the tenant by the deed of April 23, 1873.

In 1881 Mahon executed to one McCormick of Brooklyn, New York, a deed whose description included, with other land, the demanded premises, and the demandant claims under this last conveyance. Although the tenant raises the question whether the demandant has the title which McCormick took under this deed, we will assume in favor of the demandant that he has. We therefore come back to the deed of February 28, 1877, to determine its legal effect, in view of its peculiar language relative to the lost deed. The recital purported to show that the grantee previously had acquired a perfect title to the property, and that his only embarrassment in regard to it resulted from a loss of the deed. If the deed had not been recorded, he was left without a visible paper title. To obtain the muniments of title by compulsory process, he would be obliged to bring a suit in equity. If the deed was recorded he not only had a good title, but he easily could establish it by proof. Presumably he did not know, or did not remember that the deed had been recorded, and he accordingly obtained the second deed. In considering it, the judge well might receive proof of the situation and previous dealings of the parties, in reference to the subject referred to in it, for the purpose of applying the language of the deed, and especially of the recital in it, to the conditions to which it related. *Whittier Machine Co.* v. *Graffam*, 156 Mass. 415. Accordingly evidence was received that the deed of April 2, 1873, which, except in date and the language of the *in testimonium* clause, was identical with the later deed, was given at the same time as the deed from Mahon to the tenant, which bore date April 23, 1873. The tenant also was allowed to testify that he never gave Mahon any other deed than the two which are before us.

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If there had been no evidence before the court other than the language of the deed itself to show its meaning, the recital would show, as between the parties and those claiming under them, that it was not given to create a new title, but only to perfect the evidence of a title created long before. It was "given to take the place of a deed given" previously, which had been lost. It was "of the same tenor" as the lost deed. Taking all its language together, it did not purport to convey anything. So far as it was a deed at all, it was strictly a confirmatory deed. See *Branham* v. *Mayor & Common Council of San Jose*, 24 Cal. 585, 606; *Ing* v. *Brown*, 3 Md. Ch. 521; *Fryer* v. *Rockefeller*, 63 N. Y. 268; *Fauntleroy* v. *Dunn*, 3 B. Mon. 594, 617. Of a confirmatory deed it has been said by an elementary writer that, "Confirmation is the approbation or assent to an estate already created, which, as far as it is in the confirmer's power, makes it good and valid: so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by the force of such words that are foreign to the business of confirmation, and by their own force and power tend to create the estate." Gilbert on Tenures, 107. As against the grantors the grantee had a perfect title by his former deed. It was as if the deed in question had declared that the grantee became the owner of the property in April, 1873, and lost the usual evidence of his ownership, and that the new deed was given as additional evidence of the fact. Such a writing creates no title, and conveys nothing which has come into the grantor's ownership since the making of the original deed. It takes the place of the original deed, and is evidence of the making of the former conveyance as of the time when it was made. If under our system of registration or otherwise, it is necessary to give it effect as in itself a conveyance, it is only confirmatory evidence of the title which passed by the original deed. The oral testimony introduced makes it very plain that the deed referred to in the recital is the deed bearing date April 2, 1873, and that the statement that it was given April 23, means that it was delivered then, at the same time as the deed from Mahon to the tenant, which was dated April 23. Probably its date was not remembered when the new deed was made.

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The oral testimony objected to had no tendency to contradict or enlarge the meaning of the deed. If no such testimony had been introduced, the deed on its face would be construed as furnishing evidence of a title which had been created previously, and not as creating a new title. But full information in regard to the subject to which it relates simply confirms its obvious meaning.

It is questionable whether the deed from Mahon bearing date March 24, 1877, conveying the easterly half of Eastern Avenue, adjoining the land described in the deed of April 23, 1873, from Mahon to the tenant, was strictly competent. It was made a short time after the deed in question, and it is an act which tends somewhat to show the understanding of the parties to it at the time. The deed from Mahon, under which the demandant claimed, was made several years afterwards, when this deed had been recorded in the registry. Whether it was competent or not, the admission of it did the demandant no harm. Upon the undisputed facts the judge could not find for the demandant and the finding for the tenant was correct.

Exceptions overruled.

ELINE A. EVENSEN, administratrix, *vs.* LEXINGTON AND BOSTON STREET RAILWAY COMPANY.

Worcester. October 5, 1904. — November 23, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Contributory of third person, In driving, Gross negligence. *Words*, "Gross negligence."

An administrator can recover for the death of his intestate caused by the gross negligence of the servants of a street railway company, if the intestate at the time of the accident had intrusted himself to the care of the driver in a wagon by whose side he was sitting, and the driver was in the exercise of due care.

Whether one driving in a wagon at night, who, approaching a cross road on which electric cars run, listens and hears no gong or other sound indicating the approach of a car, his view of the cross road being at some points wholly obstructed by houses and as he comes near the track much obscured by overhanging trees, and drives upon the track where he is struck by a car, is in the exercise of due care, is a question of fact for the jury.

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It is evidence of gross negligence on the part of a motorman within the meaning of R. L. c. 111, § 267, upon which a street railway company may be found to be liable for causing the death of a person who is in the exercise of due care and is not a passenger or in the employ of such corporation, that on a dark night an electric car was run down a slight grade across an intersecting street in a thickly settled part of a town, where the view from one street to the other was at some points entirely cut off by houses and at others greatly obscured by overhanging trees, at a speed of from ten to twelve miles an hour without sounding any gong, that a traveller in a wagon was run over at the crossing and his body was found about seventy feet from the place of collision, where it evidently had been thrown or carried by the car, and that the car stopped about thirty-five or forty feet farther on.

TORT by the administratrix of the estate of Martin Evensen, under R. L. c. 111, § 267, for the use of herself as widow and of seven minor children, for causing the death of the plaintiff's intestate through the alleged gross negligence of the defendant's servants, in running down the intestate while he was being driven in a farm wagon by one Helchier, whose guest he was, down Academy Lane and across the tracks of the defendant on Sudbury Road in Concord. Writ dated April 25, 1902.

In the Superior Court *Gaskill*, J., at the close of the plaintiff's evidence, ruled, that the plaintiff had not shown due care on the part of her intestate, and had not shown gross negligence on the part of the defendant's servants and agents, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

G. R. Warfield, for the plaintiff.

A. P. Rugg, (*H. H. Thayer* with him,) for the defendant.

HAMMOND, J. The team was owned and driven by Helchier, who was sitting upon the right hand side, while Evensen the plaintiff's intestate was sitting on the left hand side. The evidence tended to show that the latter "was not feeling well," and had the collar of his overcoat turned up, and that he had intrusted himself to the care of the driver. The question therefore upon this branch of the case is whether Helchier was in the exercise of due care. It would serve no useful purpose to recite the evidence in detail. If the plaintiff's testimony is to be believed, Helchier, at several points on Academy Lane, as he was approaching Sudbury Road, looked for the car; he was listening all the time and he heard no gong or whistle or anything else indicating the approach of a car; while at some points

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he could see two or three hundred feet up the track on Sudbury Road, his view was wholly obstructed at others; and as he came near the corner of the two streets and near the track the view was much obscured by overhanging trees, both upon the lane and upon the road. Upon this, in connection with the other evidence, especially that with reference to the speed of the car and the darkness, we cannot say as matter of law that Helchier was not in the exercise of due care. It was a question for the jury. *Kelly* v. *Wakefield & Stoneham Street Railway*, 179 Mass. 542.

It is strongly urged by the defendant that there was no evidence of gross negligence on the part of the servants of the defendant; that there is nothing to show that the rate of speed was any greater than usual, and that the failure to sound the gong is not of itself gross negligence. There is perhaps no term of which it is more difficult to give a practically useful definition, or even to form a practical conception, than this term "gross negligence" as used in the statute under which this action is brought, especially when the dividing line between that and what is called ordinary negligence is to be drawn. In some respects it is perhaps unfortunate that a right of action may be made to depend upon this dividing line. Of course the greater includes the less, and where there is gross negligence there is always negligence. The line between due care and negligence may be stated clearly enough for the practical administration of the law, but when one leaves the shore of due care and plunges into the sea of negligence, how far out can he go before he crosses the dividing line between what is called ordinary negligence and gross negligence? The most that can be said, perhaps, is that gross negligence is further from due care than ordinary negligence, but that is not entirely satisfactory. Still the dividing line is left undisclosed, for how far out does ordinary negligence extend? We are sensible of the danger of drawing the line too near to due care, and of finding gross negligence where only ordinary negligence exists. Each case, however, must be decided according to its peculiar features.

In this case it appeared that Academy Lane and Sudbury Road were both public highways in the thickly settled residential part of the town. The evidence tended to show that a person travelling upon the lane could have only a very imperfect view up

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Sudbury Road, the view being entirely cut off at some points by houses and greatly obscured at others by the overhanging trees located upon the south side of the lane and the west side of the road. The same obstructions of course would have a similar effect upon the view which a motorman on the road would have of a traveller on the lane. The night was dark, and there was evidence that no gong was sounded and that the car was going from ten to twelve miles an hour down the slight incline of the road; that Evensen's body was found on the track about seventy feet from the place of the collision, where it evidently had been thrown or carried by the car, and that the car stopped about thirty-five or forty feet farther on. In view of the situation of the two ways in a thickly settled part of the town, the amount of travel reasonably to be expected thereon, the objects which obstructed or impaired alike the view which the traveller upon the lane could get of the car and that which the motorman could get of the traveller, the darkness of the night, the speed of the car, the incline of the rails, their nearness to the west side of the road and to the trees on that side rendering it impossible for a team coming out of the lane to avoid a collision by turning to the west of the track, and especially the very serious consequences likely to arise in case of collision with a car moving so rapidly, we cannot say, as matter of law, that the motorman was not guilty of negligence, or that the negligence was not of so high a degree as to amount to gross negligence. The question was for the jury.

Exceptions sustained.

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OLAF WENDALL *vs.* JOHN M. FISHER.

Bristol. October 24, 1904. — November 23, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Way, By exception or reservation, By unrecorded grant. *Deed*, Construction of covenant, Unrecorded grant. *Easement.*

A clause in a covenant against incumbrances in a deed, excepting from the covenant a right to pass and repass on a certain road over the land conveyed, merely modifies liability upon the covenant, and does not estop the grantee from denying the right described; still less is it an exception or a reservation from the grant.

An instrument executed under seal by the owners of adjoining lots of land, purporting to establish the boundaries of a right of way, although unrecorded, is binding upon subsequent owners of the servient lot having notice of its existence.

CONTRACT for alleged breach of the covenants of warranty in a deed of certain land on Locust Street in Attleborough. Writ dated March 3, 1903.

At the trial in the Superior Court before *Hitchcock*, J., it appeared, that in April, 1857, one Peter Thacher conveyed the premises to one Albert Goff in fee, by a deed which contained no exception or reservation in either the granting or the habendum clause, and contained the following covenants: "and I the said Peter Thacher for myself and my heirs, executors and administrators, do covenant with the said Albert Goff and his heirs and assigns, that I am lawfully seised in fee simple of the aforegranted premises, that they are free from all incumbrances except a right to pass and repass in the road leading from the barn to the swamp where we get mud by our putting up bars, with teams and otherwise; that I have a good right to sell and convey the same to the said Albert Goff, his heirs and assigns forever as aforesaid, and that I will and my heirs, executors and administrators shall warrant and defend the same to said Albert Goff, his heirs and assigns forever, against the lawful claims and demands of all persons."

At the time of this conveyance the premises were bounded upon one side by the highway and upon the other three sides by the remaining land of the grantor. The "road leading from the

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barn to the swamp" mentioned in the deed was a road or path running across the land conveyed from one portion to another portion of the grantor's remaining and adjoining land. The defendant derived title to the premises through mesne conveyances from Albert Goff, and conveyed the premises to the plaintiff. All the deeds contained full covenants of warranty. When the action was brought, Peter Thacher was dead and his son John Thacher was the owner of the land surrounding the premises on three sides.

The plaintiff offered in evidence a written agreement executed by Albert Goff and John Thacher, acknowledged on November 19, 1900, but not recorded, a part of which was admitted against the objection and subject to the exception of the defendant. The part admitted was as follows:

"This agreement made this twelfth day of February 1869 between John Thacher of Attleboro of the one part and Albert Goff of said town of the other part witnesseth;

"And whereas there is a right of way across said Goff's farm for said Thacher to use as occasion may require, now in order to make and establish said way certain, and to establish the bounds thereof for us and our heirs and assigns forever, do hereby agree to establish said way as follows," [here followed a description of the way by courses and distances.] "John Thacher" (seal) "Albert Goff" (seal).

Evidence also was offered by the plaintiff showing that the defendant knew of the execution and existence of this agreement, having been told by Thacher and other persons that the agreement was in existence. Evidence also was produced showing that the way in question had been used continuously and uninterruptedly by Thacher and those in his employ for different purposes since 1857, and that the defendant knew that the right of way had been used by Thacher since 1857, and was told by Thacher and others in his employ that Thacher had such a right of way, and also showing that when the plaintiff bought from the defendant he constructed a wire fence across the location of the way, and that Thacher cut the fence, and then informed the plaintiff of his right of way over the property; that thereupon the plaintiff went to see the defendant and told him of the right of way in question, and of the agreement, and

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that the defendant stated that he knew of the existence of the agreement, and had known it when he bought the premises, but that he would make things right.

No evidence was produced by the defendant in contradiction of the foregoing testimony.

At the conclusion of the evidence the defendant asked the judge to rule as follows: 1. That the plaintiff must rely upon a sufficient reservation of a right of way in the deed of Peter Thacher to Albert Goff offered as evidence. 2. That the exception under the covenant against incumbrances is not a reservation of a right of way. 3. That the deed does not contain any reservation of a right of way. 4. That, if the judge rules that the exception contained in the covenant against incumbrances is a legal reservation of a right of way, such reservation was a personal right of the grantor and did not descend to his heirs at law or pass to his grantees. 5. That if the judge rules that the exception inserted in the covenant against incumbrances is an effective reservation of a way, such reservation is limited to the life of the grantor and does not pass to his heirs and assigns, and a reservation in fee was not created.

The judge refused to give these rulings, but instructed the jury that they might consider the deed of 1857 from Peter Thacher to Albert Goff as establishing a right of way still existing across the plaintiff's land.

The jury returned a verdict for the plaintiff in the sum of $1,030.80; and the defendant alleged exceptions.

F. B. Fox, for the defendant.

H. H. Robinson, (*R. P. Coughlin* with him,) for the plaintiff.

HAMMOND, J. By the granting and the habendum clause in the deed of Thacher to Goff, the land therein described was conveyed in fee. The clause "except a right to pass and repass in the road leading from the barn to the swamp where we get mud by our putting up bars, with teams and otherwise" first appears in the covenant against incumbrances.

This exception must be regarded therefore as inserted only for the purpose of modifying to that extent the liability upon the covenants. It did not estop the grantee from denying the existence of the right therein described as against any person asserting it. *Weed Sewing Machine Co.* v. *Emerson*, 115 Mass. 554.

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Much less was it a reservation or exception from the grant; and the principle upon which cases like *White* v. *New York & New England Railroad*, 156 Mass. 181, and *Hamlin* v. *New York & New England Railroad*, 160 Mass. 459, 461, rest is not applicable. It follows that the second and third of the defendant's requests for instructions should have been given, and the instruction that the jury might consider the deed from Thacher to Goff as establishing a right of way which is still existing across the plaintiff's land was erroneous.

No error is shown in the admission of the sealed agreement subsequently executed by Thacher to Goff, purporting to establish the boundaries of the way. Although unrecorded, it was binding upon subsequent holders under Goff with notice.

Exceptions sustained.

MARY BRUSSEAU, administratrix, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 24, 1904. — November 23, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Railroad. Negligence, Gross negligence.

In an action against a railroad company under R. L. c. 111, § 268, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, alleged to have been caused by the defendant's failure to give the signals required by § 188 of the same chapter, there was evidence, that the plaintiff's intestate, being awake and sober, was driving a quiet horse late at night in a covered wagon carrying bottles which rattled, that when near the crossing he shouted "whoa" to his horse, that there was no bell or whistle to warn him, that his view of the track was obstructed by freight cars, that it was somewhat foggy, that the gates seemingly intended to warn travellers of approaching trains were up, and that while thus crossing the track a train of the defendant decapitated his horse, broke his wagon and instantly killed him. *Held*, that the case properly was submitted to the jury on the questions, whether the signals required by law were given, whether their absence contributed to the collision, and whether the defendant had proved gross negligence on the part of the plaintiff's intestate.

TORT, under R. L. c. 111, § 268, for the loss of life of the plaintiff's intestate at a grade crossing of the defendant's railroad on Sawyer Street in New Bedford, alleged to have been caused

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by the defendant's failure to give the signals required by § 188 of the same chapter, a train of the defendant having decapitated the horse of the plaintiff's intestate, broken his wagon and instantly killed the intestate, while he was attempting to drive over the crossing in a covered express wagon at 1.15 A. M. on Sunday, May 18, 1902. Writ dated June 21, 1902.

At the trial in the Superior Court *Holmes*, J. refused to rule that upon all the evidence the plaintiff could not recover, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $3,500. The judge reported the case for determination by this court. If the ruling of the judge was right, judgment was to be entered on the verdict; otherwise, judgment was to be entered for the defendant.

F. S. Hall, for the defendant.

J. W. Cummings, (*E. Higginson* with him,) for the plaintiff.

HAMMOND, J. The evidence as to whether the signals required by the statute were given was conflicting, but it cannot be said as matter of law that it did not justify the jury in finding for the plaintiff on that issue. See *Dalton* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 344, and cases cited; also *McDonald* v. *New York Central & Hudson River Railroad*, 186 Mass. 474. If the signals were not sounded, the jury under the circumstances might infer that the absence of them contributed to the injury. *Doyle* v. *Boston & Albany Railroad*, 145 Mass. 386.

The burden was upon the defendant to prove that the plaintiff's intestate was grossly negligent, *McDonald* v. *New York Central & Hudson River Railroad*, *ubi supra*, and it is vigorously contended that as matter of law the evidence shows that he was. Although there are cases in which it has been adjudicated as matter of law that under the circumstances gross negligence was proved, (*Debbins* v. *Old Colony Railroad*, 154 Mass. 402, *Emery* v. *Boston & Maine Railroad*, 173 Mass. 136,) still, speaking generally, the question whether a particular fact is proved by oral testimony depends largely upon the view taken by the jury as to the credibility of the witnesses, and hence it is comparatively seldom that, in the absence of binding admissions or agreements as to facts, a ruling that as matter of law a material fact has been proved can be given. The evidence in this

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case tended to show that the plaintiff's intestate was sober, was driving a quiet and gentle horse, at a moderate speed; that in his wagon there were bottles which rattled; that when near the crossing he shouted "whoa" to his horse; that the wagon cover extended over the whole side of the wagon; that there was no bell or whistle to warn him; that for some few minutes before reaching the crossing he had been travelling on a street parallel with and near to the railroad location; that as he turned into Sawyer Street and approached the crossing his view of the track upon which the train was coming was obstructed by freight cars standing near Sawyer Street; that the gates seemingly intended to warn travellers of approaching trains were up, and that the night was somewhat foggy. The evidence tended further to show that he was awake and guiding his horse. It was not shown that he observed the absence of the gateman, or that he knew that none was usually kept there at night, or that he was not listening for the train. It was near midnight, and from the absence of the signals and the fact that the gates were not lowered he had some reason to believe that no train was approaching, and that it was safe to cross. His ability to hear may have been affected by the rattling of the bottles and by the noise of the team. It is true that the evidence was conflicting as to many of the circumstances above named, especially with reference to the giving of the signals required by statute, and a verdict for the defendant reasonably might have been expected; but without rehearsing the evidence further in detail, it is plain that the question whether the plaintiff's intestate was guilty of gross negligence was not a question of law for the court but of fact for the jury, and that the case was rightly submitted to them.

Judgment on the verdict.

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MARY T. KIRK *vs.* FRANK M. STURDY & others.

Bristol. October 25, 1904. — November 23, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

In an action, by a girl employed in a jewelry factory against her employer, for injuries from a pail of hot water which had been attached to a steam pipe at the top of the room falling on her head, it appeared, that the defendant did not own the building and had no control of the steam pipes, which as a part of the heating apparatus were under the exclusive control of the owner of the building, that the pail had been fastened to the pipe by the "head piper or plumber" of the owner of the building, to catch the drip from a leak in the pipe which he had attempted to repair, that the pail was plainly in sight, but the way in which it was attached to the pipe could not be seen from the floor, and there was nothing in the appearance of the pail to excite suspicion or to suggest that the plumber had not done his duty properly. *Held*, that there was no evidence of negligence on the part of the defendant toward the plaintiff in failing to inspect the fastening of the pail, as the defendant had a right to assume that due care would be used by those in charge of the pipes, and that the plaintiff's remedy, if any, was against the owner of the building.

TORT, by a girl twenty-three years of age employed in the defendants' jewelry factory at Attleborough, for personal injuries from a pail of hot water which had been attached to a steam pipe at the top of the room falling on her head. Writ dated September 8, 1902.

At the trial in the Superior Court *Hitchcock*, J. at the close of the evidence ordered a verdict for the defendants; and the plaintiff alleged exceptions.

F. S. Hall & C. C. Hagerty, for the plaintiff.

W. H. Fox, F. B. Fox & F. B. Byram, for the defendants.

HAMMOND, J. The law as to the duty owed by the master to the servant with respect to the tools and materials of which the latter is to make use, and the place in which he is to work, is well settled by numerous decisions, and, speaking generally, it is that the master is to use due care to see that in neither is there danger to the careful servant. Where these things are under the exclusive control of the master he is answerable for such care, whether the duty be performed by him in person or be

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delegated to another. He cannot free himself from responsibility for the proper discharge of a duty resting upon him in person by delegating its performance to another. But even where the tools and materials are exclusively under the control of the master the degree of care required, as in other branches of law and in every line of human conduct, varies of course with circumstances. In *Garragan* v. *Fall River Iron Works Co.* 158 Mass. 596, which was an action by a servant against his master for injuries received by reason of the rotten condition of the bagging of a bale of cotton, it was held that a purchaser of cotton in bales is not bound to have the bagging inspected with a view to ascertain whether it is strong enough to hold iron hooks inserted in it for the purpose of moving the cotton. In *Shea* v. *Wellington*, 163 Mass. 364, it was held that the owner of a quarry did not owe to his workmen the duty of inspecting an exploder well and favorably known in the market. In the first case it was said: "The performance of such a duty [of inspection] would be impracticable, and no case is cited which holds that such duty exists." In the second case it was said that in view of all the circumstances it would be unreasonable to hold "that quarrymen using these exploders owed their employees a duty to have them inspected by a competent person as to the mode and workmanship of their construction." In *Mooney* v. *Beattie*, 180 Mass. 451, which was an action by a mason against his master, a building contractor, for injuries caused by the explosion of a stone from dynamite left in it after it had been blasted from the quarry, where it appeared that the defendant purchased the stone in the usual course of business, without inspecting it, the same principle was applied, the court saying that "Such a course of inspection, while possible, is manifestly impracticable, and it is never adopted." In all of the above cases the appliances were under the exclusive control of the master, and allusion to them is made here to illustrate the doctrine that even where the master has such control the duty resting upon him does not always include that of inspection. See also *Reynolds* v. *Merchants' Woolen Co.* 168 Mass. 501.

In the present case the evidence was undisputed that the defendants did not own the building where the plaintiff was injured, but hired certain rooms in it as tenants at will; that

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they had no control of the steam pipes, which, with the heating apparatus, were under the exclusive control of the owners of the building, and that the latter furnished everything in the room except the chairs and tools with which the plaintiff and her fellow servants did their work. And the question is how far the defendants are answerable to the plaintiff for the improper fastening of the pail which was attached to the pipe to catch the drip. The pail was attached by the "head piper or plumber" of the owners of the building after "mending the leak" in the pipe. The pail was plainly in sight, but the manner in which it was attached to the pipe does not appear to have been visible from the floor. There was nothing in the appearance of the pail, as it hung there, to excite suspicion or to suggest that the plumber had not properly done his duty; and in the absence of any such appearance the defendants had the right to assume that due care had been used, and no duty of inspection rested upon them. In principle the case cannot be distinguished from *Moynihan* v. *King's Windsor Cement Dry Mortar Co.* 168 Mass. 450. In that case the plaintiff was set to work by the defendant upon a temporary or swinging stage, of which one end was supported by a permanent stage owned by the defendant and attached to its warehouse, and the other by ropes attached to a vessel discharging its cargo. The defendant had nothing to do with the ropes supporting this end, the method of attaching it to the vessel being entirely under the control of the captain of the vessel. The plaintiff, who did not know by whom the ropes were put together, furnished and managed, while at work upon the stage was injured by the falling of the stage, the result of the insufficiency of the ropes. It was held that inasmuch as "the support, control, and management of the outer end of the stage belonged to the captain . . . the duty and responsibility primarily rested upon him; and the defendant cannot be held responsible, unless upon proof of neglect of a duty of inspection and warning. In the absence of anything to excite suspicion or apprehension, the defendant might assume that due care would be used by those in charge of the vessel." As in that case, so in this, the defendant had the right under the circumstances to assume that due care would be used by those who had exclusive control of the pipes.

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It is argued by the plaintiff that the length of time during which the pail had been hanging might show ground for inspection, but that consideration does not seem to us of weight enough to turn the scale in her favor. Her right of action, if any she has, is apparently against the owners of the building.

Exceptions overruled.

COMMONWEALTH *vs.* EDWARD H. OAKES.

Essex. November 1, 1904. — November 23, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Evidence, Competency.

At the trial of an indictment for uttering a forged promissory note, the defendant, who was the chief of police of a certain town, in order to discredit one R., the principal witness for the government, introduced evidence tending to show hostility of R. toward the defendant. The government then put in evidence to the effect that R. was trying to get possession of a hotel which had been leased to persons for whom the defendant was manager, and evidence that the defendant said that he wanted R. to take possession of the property and run it, and that "he need not be afraid of being arrested for illegal sales of intoxicating liquors." The jury were instructed that the evidence was admissible only to show an attempt on the part of the defendant to conciliate R. *Held*, that the evidence was admissible for the purpose to which it was limited by the instruction.

LATHROP, J. This is an indictment charging the defendant with knowingly uttering a promissory note for $900, the indorsement of a third person being forged. At the trial in the Superior Court a verdict of guilty was returned, and the case is before us on the defendant's exceptions to the admission of certain evidence.

The government had introduced evidence to show that the defendant had uttered the note as charged in the indictment, and there was evidence on the part of the defendant to the contrary. The principal witness for the government was one Roberts, who gave material evidence. The defendant sought to discredit Roberts in various ways, and introduced evidence tending to show hostility on the part of Roberts toward him. The government was then allowed to put in evidence a conversation between

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one Curry, an attorney at law, and the defendant, by which it appeared that Roberts was endeavoring to get possession of some real estate, on which was a hotel, which had belonged to his wife of whose estate he was administrator, and which had been leased to certain persons for whom the defendant was acting as manager. In this conversation it was testified that the defendant, who was chief of police in Revere, where the land was situated, said that he wanted Roberts to take possession of the property and run it, and "he need not be afraid of being arrested for illegal sales of intoxicating liquors." The jury were instructed that the evidence was admissible only to show an attempt on the part of the defendant to conciliate Roberts. We are of opinion that the evidence was admissible for the purpose for which it was offered, and to which it was limited by the presiding judge.

The remaining exception relates to a conversation between the defendant and one Cole. We do not deem it necessary to consider this question at length. Taken by itself it amounted to but little, but taken in connection with the other evidence in the case we are of opinion that it was in the discretion of the presiding judge to admit it.

Exceptions overruled.

J. H. Sisk (*W. E. Sisk* with him,) for the defendant.

W. S. Peters, District Attorney, for the Commonwealth.

HARRIETTE K. BULLOCK *vs.* HAVERHILL AND BOSTON DISPATCH COMPANY.

Essex. November 8, 1904. — November 23, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Carrier. Evidence, Presumptions and burden of proof. *Practice, Civil*, Agreed statement of facts.

There is a presumption of fact that a loss of articles from a package transported by express occurred in the hands of the last of two successive carriers.

Where a case is submitted on an agreed statement of facts with the power to draw inferences, a finding of the court below on a matter of fact is conclusive unless the facts agreed show it to be erroneous as a matter of law.

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CONTRACT OR TORT against an express company as a common carrier of goods, for the alleged loss of a pair of gold sleeve buttons and a silver brush and comb from a dress suit case delivered by the plaintiff to the Chase Express Company of Brookline at Brookline for delivery at the plaintiff's residence at Haverhill through the defendant, and alleged to have been delivered by the first named express company to the defendant in good order and condition. Writ dated November 16, 1903.

In the Superior Court the case was heard by *DeCourcy*, J., without a jury, upon an agreed statement of facts, which terminated with an agreement "that the court may draw such inferences from the facts herein stated as it may deem proper."

The judge found for the plaintiff in the sum of $30, with interest from the date of the writ.

C. H. Poor & E. B. Fuller, for the defendant.

J. H. Pearl, for the plaintiff.

LATHROP, J. We find nothing in the facts of this case which distinguishes it from *Moore* v. *New York, New Haven, & Hartford Railroad*, 173 Mass. 335, and *Cote* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 290. There was a presumption of fact that the injury sued for was caused by the last carrier. While the case was submitted to the court below on agreed facts, it was agreed that the court might draw inferences. The finding of that court in favor of the plaintiff was on a matter of fact which we cannot change, unless the facts agreed show, as matter of law, that the last carrier has exonerated itself from liability. We cannot say that they so show.

Judgment for the plaintiff affirmed.

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GIDEON THOMPSON *vs.* AMERICAN WRITING PAPER COMPANY.

Hampden. September 27, 1904. — November 25, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

In an action, by an experienced workman in a paper mill against his employer, for injuries from the falling of a floor of the mill across which the plaintiff was assisting in moving a heavy portion of a paper machine, called a cone pulley, it appeared, that the floor which fell was supported by cleats, and that the fastening of the cleat which gave way had become defective, the nails having been eaten away so that they did not hold, and that in the room below were tanks in which sizing was boiled, making steam which might cause the nails holding the cleats to rust and become weakened. The plaintiff testified that he knew nothing about this floor, and it did not appear that its manner of support was the usual construction of floors in the mill. *Held*, that upon this evidence a jury might find, that, even if there was no defect in the original construction of the floor, and even if the plaintiff had knowledge of the method of construction, the plaintiff had the right to assume that due care would be taken by his employer to see that the fastening of the cleat should be maintained at its original strength, and that the accident happened from the failure of the defendant to exercise such care; that the plaintiff did not assume the risk of such an accident, and, in estimating the strain to which the floor would be subjected by the movement of the heavy pulley over it, had the right to assume that due care had been used in maintaining the fastening of the cleat in proper condition. *Held*, *also*, that the defendant must be assumed to have known of the way in which the floor was constructed and that heavy articles were likely to be moved over it, and to have known the relative position of the sizing tanks and the cleat, and that the defendant, while it was under no obligation to the plaintiff to change the method of its floor construction, owed him the duty of using due care in seeing that the floor, including the fastening of the cleat, was kept in proper repair, it being a question for the jury whether upon the evidence the accident was attributable to a failure to use such care.

CONTRACT, at common law, by a workman in the paper mill of the defendant at Holyoke, for injuries alleged to have been caused by the negligence of the defendant, in failing to furnish the plaintiff with a reasonably safe and suitable place in which to work, and in setting him to work upon a certain floor so insecure, unsafe and dangerous, that, while the plaintiff was working there under the defendant's orders and in the exercise of due care, the floor gave way, causing the injuries alleged. Writ dated October 7, 1903.

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At the trial in the Superior Court before *Maynard*, J., it appeared, that the accident happened on Sunday, April 12, 1903; that during the previous week the machinery of the mill had broken down, and the plaintiff by orders of one Griswold, the defendant's superintendent, went to the mill on Sunday morning with Griswold and four other men to attend to the repairs; that in the morning they worked about an hour or an hour and a half taking out a part of "the big paper machine" called a cone pulley, the weight and size of which are stated in the first paragraph of the opinion; that it was moved across the floor in question on a four wheeled truck, running on skids, pushed by bars and also pulled by a rope; that the cone pulley was taken to a machine shop and returned at night, and the accident happened about half past eight o'clock in the evening when the pulley was being moved back again across the same floor; that Griswold was not present at the time of the accident, having gone home about eight o'clock when they began to return the pulley, saying that he did not feel well, and telling the men "You fellows get along the best you can." The substance of the evidence in regard to the cause of the falling of the floor is stated in the opinion.

At the close of the plaintiff's evidence, the judge ruled that there was no evidence to be submitted to the jury, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

F. F. Bennett, for the plaintiff.

W. Hamilton, (*W. H. Brooks* with him,) for the defendant.

HAMMOND, J. The work of removing the pulley in the morning was performed under the personal supervision of Griswold, the master mechanic of the mill, and was attended with no accident. The pulley safely passed over the very floor which gave way under its weight in the evening. It was about fourteen feet long, and weighed from one and a half to two tons. In the ceiling of the room were four eyebolts, one having been put in by Griswold that morning, and hooked to three of them, including this one, were chain falls suitable for the purpose of relieving the floor of all or a part of the weight of the pulley.

One of the grounds of the defence is that at the time of the accident the plaintiff was directing the work, and was negligent in failing to make proper use of the chain falls; and the brief of the defendant contains a detailed description of a way in which,

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by a certain use of the eyebolts and falls, the strain upon the floor could have been relieved, as the defendant says, so that the pulley would have passed safely over it. The evidence, however, as to whether the work was under the direction of the plaintiff was conflicting; and a careful examination of the evidence as to the manner in which the pulley was moved and the falls used shows that a jury would be warranted in finding that it was moved in the evening in the same manner as in the morning, except that in the evening the small end of the pulley was kept pointed towards the posts, whereas in the morning it had been kept pointing towards the arch, or in other words, both in the morning and in the evening the pulley was moved small end foremost. Upon the whole evidence we are of opinion that the questions whether the plaintiff was in charge of the undertaking and whether the accident was attributable to a negligent failure to make proper use of the eyebolts and chain falls, or to any other negligent act in the work, are questions of fact for the jury.

It also is urged by the defendant that the danger of the work was known to the plaintiff and that he assumed the risk. The plaintiff was a carpenter and millwright of large experience. He had been employed as such in this mill for five years, and had worked under Griswold making repairs upon floors and doing "anything round the mill [he was] ordered to do." The evidence tended to show that the floor of the room in question was constructed in the following manner. The floor timbers all ran one way. The floor proper consisted of three inch pine planks running transversely to the floor timbers; over these planks was laid a top flooring of one and one eighth inch hard pine, running parallel with the timbers and being "flush" with them, so that the top of the timbers was visible. At the particular point where the floor gave way, the ends of the floor planking were supported by a cleat of two by four "plank" spiked to the side of the floor timber so as to form a flange upon which the ends rested, and to which they were spiked. The ends of the flooring plank were not mortised into the timber, but were supported solely by this cleat. The plaintiff testified that he knew nothing about this floor, and it did not appear that such was the usual construction of floors in the mill, or that the plaintiff ever had seen or known of any such construc-

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tion in the mill. There was evidence tending to show that the fastening of the cleat had become defective, one witness who saw the state of things immediately after the accident testifying that "the nails had been eaten away so it [the cleat] didn't hold, something had eaten the nails away"; and another, that "some of these nails pulled off and some broke." The evidence tended further to show that in the room directly underneath this flooring there were several "size tanks" in which "sizing" was boiled, and that this operation "makes steam"; and it was contended by the plaintiff that by reason of this steam the spikes were subjected to a peculiar and unusual liability to rust and become weakened.

Upon this evidence a jury might find that, even if there was no defect in the original construction of the floor, and even if the plaintiff had knowledge of the method of construction, still he had the right to assume that due care would be taken by his employer to see to it that the fastening of the cleat should be held to its original strength, and that by reason of the failure to exercise such care the accident happened. Such a risk was not assumed by the plaintiff. *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282. In considering the strain to which the floor would be subjected by the movement of the pulley over it, he had the right to assume that due care had been used to see that the fastening of the cleat was in proper condition.

It cannot be said as matter of law that the evidence would not warrant a finding that the defendant was negligent. It must be assumed that the defendant knew of the way in which the floor was constructed, that heavy articles were likely to be moved over it, that the cleat was substantially the only support, and that consequently its fastening should be kept in such a condition as to bear the strain caused by the weight of such heavy articles. Moreover the defendant must be assumed to have known of the relative position of the "size tanks" and the cleat. While therefore it was under no obligation to the plaintiff to change the method of its floor construction, still it owed to him the duty to use due care to see that the floor, including the fastening of the cleat, was kept in proper repair. Whether the accident was in any way attributable to a failure to use such care is upon the evidence a question for the jury.

Exceptions sustained.

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WILLIAM MILLERICK & another *vs.* WILLIAM PLUNKETT & another.

Bristol. October 25, 1904. — November 28, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Devise and Legacy, Construction.

A will contained the following: "I devise to my wife A. the cottage house and the land 'appertenant' thereto. Being the house I now live in and situate on William Street in Fall River." Then followed an attempted description, which gave the boundaries only of the lot first owned by the testator on which the house originally was built and omitted a strip of land belonging to the testator, extending twenty-three feet farther on William Street, on which stood the greater part of an ell, which had been added by the testator to his house, and all of his barn, with a path and also a plank walk between the house and the barn, used as an outside kitchen, and a vegetable garden. *Held*, that the erroneous description must yield to the intention of the testator that his wife should have not only the whole of the house and the land under it but also the rest of the twenty-three feet used as appurtenant to the house, extending to a lot sold by the testator before his death, revoking by such sale a devise of the last named lot contained in his will.

PETITION, filed March 12, 1904, in the Court of Land Registration, now by St. 1904, c. 448, the Land Court, for the registration of the title to certain real estate on William Street in the city of Fall River, claimed by the petitioners as the heirs at law of Ann Plunkett, widow of Joseph Plunkett, by whose will the petitioners alleged that the whole of the estate claimed was devised to Ann including the portion in dispute.

The case was tried before *Davis*, J., who found the following facts:

Joseph Plunkett on October 11, 1895, the date of his will, was the owner of all the land on the south side of William Street in Fall River between Mulberry Street and Grant Street, including the premises in question. The whole of the land originally owned by him is shown by a plan which was made a part of the record and of which a reduced copy is printed on the following page.

This property had been acquired by Plunkett in two lots. The first lot, which he purchased in 1867 from one Corbett, was

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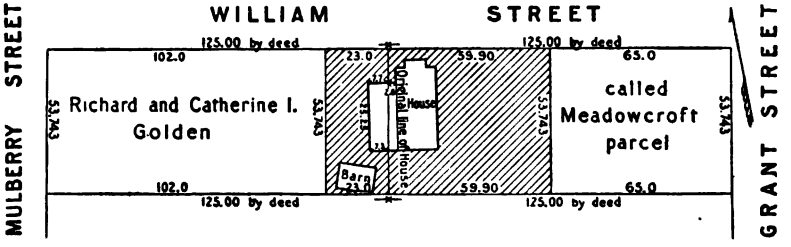
about one hundred and twenty-five feet long on William Street, by fifty-three and seven hundred and forty-three one thousandths feet deep. On this tract, in or about the year 1870, he erected a house at the corner of Grant and William Streets, setting off therewith about sixty-five feet of land on William Street from the corner of Grant Street. On the west side of the Corbett parcel stood a cottage house occupied by Plunkett as a dwelling for himself and his wife and children from the time of its purchase until his death.

In 1872 Plunkett acquired from his wife through a third person the tract between the former Corbett land and Mulberry Street, one hundred and twenty-five feet long on William Street by fifty-three and seven hundred and forty-three one thousandths feet deep. This land had been conveyed to his wife in 1869 by the Blackstone Manufacturing Company.

In or about the year 1882, Plunkett built an ell on the west side of his cottage house, extending it ten and three tenths



feet westerly as shown on the plan, across the original boundary line between the former Corbett and Blackstone Manufacturing Company lots as shown on the plan. This ell contained two bedrooms, and was supported by a stone foundation. The barn, later used as an outside kitchen, shown on the plan, was moved to its present position by Plunkett about 1883. The house had one cellar door, opening out from the west wall of the bay window on the front of the house. This door was put in by Plunkett, and starting about three feet therefrom a path led around the west side of the ell, and across the land in dispute, to the barn or outside kitchen. This building sometimes was used in summer for cooking and for washing clothes in connection with the cottage down to or through the year 1895, and thereafter it was used mostly for wood.

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The household washing usually was done in the cellar of the house, and then was carried out through the cellar door and along the path around the westerly side of the ell and the rear of the house to the clothes yard east of the house. There also was a plank walk from the rear door of the original house to the east side of the barn. The land at the west of the cottage was used by Plunkett as a vegetable garden. This garden extended to Mulberry Street before the sale to the Goldens in 1897 referred to below, and thereafter it extended to the Goldens' east line.

On October 11, 1895, Joseph Plunkett made his will containing the following provisions:

"First, I devise to my wife Ann Plunkett the cottage house and the land 'appertenant' thereto. Being the house I now live in and situate on William Street in Fall River. The land begins at the northwest corner of lot to be described, thence running easterly along the line of William Street sixty feet, thence running southerly fifty-three & 743-1000 feet, thence running westerly sixty feet to the land which formerly belonged to the Blackstone Mnfg. Company, thence northerly fifty-three & 743-1000 feet to the point of beginning.

"Second, I devise to my wife Ann Plunkett, and my daughters Mary Wrightington and Elizabeth Andrews and my sons Edward Plunkett and John Francis Plunkett, the house on the corner of Grant and William Street with the following parcel of land which is 'appertenant'. Beginning at the northeast corner of the lot, thence running southerly fifty-three & 743-1000 feet along the westerly side of Grant Street; thence running westerly sixty-five feet, thence northerly fifty-three & 743-1000 feet to William Street, thence easterly sixty-five feet to the point of beginning. The said house and land to be divided among them in equal shares, share and share alike.

"Third, I devise to my sons William Plunkett, Joseph Plunkett, Edward Plunkett and John Francis Plunkett the lot of land at the corner of William and Mulberry Streets, which is the land formerly owned by the Blackstone Mnfg. Co. and contains twenty-four & 67-100 rods of land more or less."

On April 8, 1897, Joseph Plunkett conveyed to Richard and Catherine I. Golden, by full warranty deed, the parcel of land

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on the corner of William and Mulberry Streets, fifty-three and seven hundred and forty-three one thousandths feet deep and one hundred and two feet long on William Street, and bounding easterly on other land of Plunkett. During his life, Plunkett habitually spoke of the lot originally owned by the Blackstone Manufacturing Company as the "Blackstone lot," and after the conveyance to the Goldens, said to his son William, one of the respondents, that he had sold a part of the Blackstone lot and had a part of it left. He also said to his son William and his daughter Mary, also a respondent, at the funeral of his son Edward and many times before, that the Blackstone lot was to go to the boys. Edward died April 15, 1896.

Joseph Plunkett died on May 9, 1898, and the above will of October 11, 1895, containing the foregoing provisions was proved on July 1, 1898.

Joseph Plunkett's wife Ann survived him and died intestate on December 17, 1902.

Of the four sons mentioned in the will one is the respondent William and the other three, Joseph, Edward and John Francis, died before the testator and before the deed to Golden but after the execution of the will, two of them unmarried and without issue and one of them leaving issue since deceased.

The respondents claimed title, William Plunkett as a devisee under the will, and the other respondents as heirs at law of Joseph, to so much of the demanded premises as lay westerly of the original boundary line between the Corbett and the Blackstone lots, being a strip of land twenty-three feet wide next east of the Golden land and including the old barn and a portion of the ell of the house as shown on the plan.

The judge found title proper for registration in the petitioners to so much of the demanded premises as lay east of the original boundary line between the Corbett and Blackstone lots, being the tract fifty-nine and ninety one-hundredths feet wide as shown on the plan, and to so much, if any, of the demanded premises which formerly formed a part of the Blackstone lot as passed to Ann Plunkett under the will of her husband.

On the foregoing facts the petitioners requested a ruling, that under the will of Joseph Plunkett there passed to Ann Plunkett the entire tract of land lying between the Golden and Meadow-

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croft parcels as shown on the plan, and the respondents requested a ruling that no portion of the former Blackstone lot passed by the devise to Ann.

The judge refused to give either ruling as requested, but ruled instead as matter of law, that under the will of Joseph Plunkett, as to the premises in controversy, his widow took title only to the cottage house, as shown on the plan, with the land thereunder, and to the tract of land fifty-nine and ninety one-hundredths feet in width lying easterly of the land formerly of the Blackstone Manufacturing Company, and ordered a decree for registration of title in the petitioners in accordance therewith.

To the refusals to rule as requested by them respectively, and to the ruling as given, both the petitioners and the respondents excepted, and, at the request of the parties, the judge reported the case for determination by this court.

If the ruling and refusals to rule were right, a final decree was to issue as ordered; otherwise, such final decree was to be entered as this court might direct.

E. Higginson, (*J. W. Cummings* with him,) for the petitioners.

I. Brayton, for the respondents.

KNOWLTON, C. J. This case presents but a single question, namely, What is the proper interpretation of the will of Joseph Plunkett, in reference to the devise to his wife of the house in which he lived, with the land appurtenant thereto. The difficulty arises from the use of terms of description, in that devise and in other parts of the will, which are inconsistent with one another. The mistake probably arose from the testator's failure to remember the true location of the boundary line between lots acquired by him at different times. The will was made in 1895, and he had owned the greater part of the land since 1867. The other part his wife acquired in 1869, and conveyed to him through a third person in 1872. The cottage house in which the testator lived, as originally constructed, had its westerly wall within about two and one half feet of the westerly line of the lot which he first purchased. In 1882 he built an ell on the west side of the house, extending it ten and three tenths feet, so that it stood over between seven and eight feet upon the land conveyed to him by his wife. This ell contained two bedrooms, and was supported by a stone foundation. The next year a very

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small barn was moved upon the rear portion of the lot, so that a part of it was directly back of the ell and a part of it extended farther westward. According to the plan, the front part of the barn was not more than six or eight feet from the rear of the ell. The cellar of the house had but one door, and this was put in by the testator. It was connected directly with the barn by a path. The rear door of the original house also was connected with the barn by a plank walk. This barn afterwards was used in connection with the house, in summers for cooking and washing clothes until after the year 1895, and afterwards mostly for keeping wood. The household washing was done in the cellar, and the clothing was then carried out through the cellar door, and along the path around the westerly side of the ell to the clothes yard, easterly of the house. The lot which originally went with the house before the construction of the ell was a little less than sixty feet long upon the street, and nearly fifty-four feet deep from front to rear.

The language of the first clause of the will is as follows: "First, I devise to my wife Ann Plunkett the cottage house and the land 'appertenant' thereto. Being the house I now live in and situate on William street in Fall River. The land begins," etc. (Then follows a description by metes and bounds, which stops at the westerly line of the lot originally bought by him, and which does not include the land under the greater part of the ell.) The lot formerly owned by his wife extended westerly along the street one hundred and twenty-five feet from the line of the lot first bought to Mulberry Street. The third clause of the will is as follows: "Third, I devise to my sons William Plunkett, Joseph Plunkett, Edward Plunkett and John Francis Plunkett the lot of land at the corner of William and Mulberry Streets, which is the land formerly owned by the Blackstone Mnfg. Co. and contains twenty-four & 67-100 rods of land more or less." The quantity of land mentioned in this devise is such as to include the land under the ell, up to the line of the testator's original purchase. In 1897 the testator sold and conveyed this lot at the corner of William and Mulberry Streets to Richard and Catherine I. Golden, except that he made the length of the lot running from Mulberry Street along William Street only one hundred and two feet, leaving twenty-three

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feet between the line thus established and the westerly line of his first purchase, upon which unconveyed portion stood the greater part of the ell and all of the barn. The question is, Where is the westerly line of the house lot devised to the testator's wife?

It is plain that the description of the appurtenant land by metes and bounds is incorrect, for there can be no doubt that the house and land appurtenant included at least all the land under the house, the ell as well as the older part of the house. It follows with equal certainty that the description of the land mentioned in the third clause, by a reference to its quantity and the source from which he obtained it, is also inaccurate. The intention of the testator that his wife should have the house and the land under it, and the land which properly belonged with it, is too plain to admit of question, and other language in the will must yield to this provision. Inasmuch as the other language that would fix the boundary line, if it stood alone, is erroneous both in the description of the devise to the widow and in that contained in the third clause, we are left to determine as well as we can, where to establish the line which will include the land which is appurtenant to the house, as the testator understood it. As the land next westerly of the ell was always used with the ell as a passageway to the clothes yard, and for a path to the barn, and as the barn was always used with the house, being connected with different parts of it by a path and by a plank walk, it would be too narrow a construction to hold that there was no land appurtenant to the house on the west, outside of the walls of the ell. The land which was retained by the testator when he sold the lot at the corner of William and Mulberry Streets extends only to a line between fifteen and sixteen feet westerly of the line of the ell, and apparently not more than three or four feet westerly of the corner of the barn. The previous use of the property by the testator and his family, together with a sale of the corner lot mentioned in the third clause after the will was made, with a boundary leaving twenty-three feet of the lot to be used as it had been used, and the occupation of the testator afterwards until his death, with no change in his will, are indications that he intended to include in the devise to his wife, not merely the land under the ell, but also a reasonable

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quantity westerly of it, which would include the barn, and leave the boundary a straight line from front to rear, as shown in the deed to Richard and Catherine I. Golden.

We are of opinion that the land in controversy was included in the devise to the testator's wife. The ruling requested in favor of the petitioners should have been given, and a decree is to be entered in their favor accordingly.

So ordered.

CALLENDER, McAUSLAN AND TROUP COMPANY *vs.* JOHN FLINT.

Worcester. October 6, 1904. — November 29, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Conflict of Laws. Evidence, Presumptions and burden of proof, Proof of foreign law, Extrinsic affecting writings. *Guaranty.*

A contract to guarantee the payment for goods sold to a certain person up to a certain amount by a dealer whose place of business is in another State, takes effect only when accepted by the dealer, and is to be construed by the law of the State where it is accepted.

In the absence of evidence as to the common law of another State it is presumed to be the same as that of this Commonwealth.

Where the language of a guaranty in writing is open to more than one construction, evidence of the circumstances under which it was given and of preliminary correspondence may be resorted to, to determine the intent of the parties.

In an action on a guaranty in writing, it appeared, that the plaintiff, a wholesale dealer, at the request of S., a retail dealer in the same kind of goods, wrote to the defendant asking whether he would be responsible for the amount of a sale of goods to S., and that a correspondence ensued in which the defendant finally wrote as follows: "After talking with S. I have decided to help him in purchasing goods of you, he says, he can buy of you on sixty days. If so, I will guarantee the payment of goods he may buy of you, not to exceed $300, on terms as above." *Held*, that, considering the circumstances under which it was given and in the light of the correspondence, this was not a continuing guaranty, but was confined to the first sale of goods by the plaintiff to S. or to the first sales amounting to $300.

CONTRACT on a guaranty in writing, by which it was alleged that the defendant agreed to guarantee the payment on demand after sixty days of all sums of money due to the plaintiff from one Joseph Sherin for goods purchased of the plaintiff up to the amount of $300. Writ dated August 20, 1903.

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The answer, among other things, alleged that the defendant's guarantee of the account of Joseph Sherin with the plaintiff was for sixty days only from the date of the purchasing of his first bill of goods sold by reason of the defendant's guarantee and after the date thereof and that the plaintiff was paid in full for all goods purchased by Joseph Sherin from the plaintiff to the amount of $300 within sixty days of such sale after the date of the defendant's written guaranty.

In the Superior Court the case was heard by *Gaskill*, J., without a jury, upon an agreed statement of facts. The judge found and gave judgment for the defendant; and the plaintiff appealed.

By the agreed statement of facts, it appeared, that in January, 1902, Joseph Sherin was conducting business at Webster, and that the plaintiff, a corporation, was conducting business in Providence in the State of Rhode Island, and was a wholesale dealer in the same kind of goods in which Sherin was a retail dealer; that Sherin went to the plaintiff in the latter part of January, 1902, and desired to open an account with it and to purchase goods on credit, when the following correspondence ensued:

"Providence, R. I., Jan. 24, 1902.

"Mr. John Flint, Webster, Mass.

"Dear Sir: Mr. Joseph Sherin of your town wishing to buy a few goods of us to-day informs us that you have told him that you would guarantee any purchase he might make from us.

"If this is correct, please send such guarantee, and greatly oblige,

"Yours truly, Callender, McAuslan & Troup Company."

"Jany. 25th, 1902.

"Callender, McAuslan & Troup Co.,

"Gents: Your letter of the 24th received. Will say I am very much surprised that you should ask me to guarantee any purchases that Mr. J. Sherin might make from you, *not* because I do not think him good, for I think him a good, straight, honest man, and one that will pay all of his bills. I have known him for several years and have yet to learn of anyone having lost by him in any way. Mr. Sherin has been in my store for four

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months, has paid his rent prompt. The store he occupied before moving in to my store for one year rent was paid promptly. If I was selling goods I should not hesitate in giving him Cr. for I consider him an honest and fair dealing man. But at my time of life I do not propose to be responsible for goods bought by any one.

"Yours truly, John Flint."

"Providence, R. I., Jan. 27th, 1902.

"Mr. John Flint, Webster, Mass.

"Dear Sir, — Yours of 25th inst. at hand regarding the guarantee we ask for on Mr. Sherin's purchases in which you say you are very much surprised we should ask for such a guarantee. It is no wonder you were surprised at this request unless you had made a previous agreement with Mr. Sherin; this we understood him to say you had done, so for this reason we wrote for the request, he distinctly telling us to hold the goods which he might select until we received the guarantee. We beg pardon for any trouble we have caused you and remain,

"Yours very truly, Callender, McAuslan & Troup Company."

"Webster, Mass., January 31st, 1902.

"Callender, McAuslan & Troup Co.,

"Gents: after talking with Mr. Joseph Sherin I have decided to help him in purchasing goods of you, he says, he can buy of you on (60) sixty days. If so, I will guarantee the payment of goods he may buy of you, *not* to exceed three hundred dollars ($300), on terms as above. I think his prospects are good, and he will come out all right.

"Yours truly, John Flint."

"(N. B.) Please sell him low so he can make a dollar.

"Received Feb. 1, '02 A. M. eight o'clock."

It further appeared, that at the time of bringing this action there was due from Sherin to the plaintiff the sum of $333.29, and that the goods for which this sum was due were sold and delivered by the plaintiff to Sherin more than sixty days before the bringing of the action. It was agreed, that no part of this sum could be recovered unless the guaranty was a continuing

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one; that the first bill for goods was about $197, that goods to a much larger amount than $300 in the aggregate were bought by Sherin from the plaintiff after the giving of the guaranty, and that Sherin had paid the plaintiff as much as $300 for goods.

The case was submitted on briefs at the sitting of the court in October, 1904, and afterwards was submitted on briefs to all the justices.

C. H. Goodell, for the plaintiff.

C. Haggerty, for the defendant.

BRALEY, J. As the contract of guaranty did not become effectual until accepted by the plaintiff, whose place of business was in another jurisdiction, its argument, that the construction of the agreement depends on the law of the place of acceptance may be conceded. *Nashua Savings Bank* v. *Sayles*, 184 Mass. 520, 522.

But judicial notice cannot be taken of the laws of another State, which must be proved, and determined like other facts, and no evidence of their provisions can be received for the first time at the argument of a case in this court. And as the agreed statement of facts contains no reference to the common law of Rhode Island the presumption follows that in the case presented it is the same as our own. *Hazen* v. *Mathews*, 184 Mass. 388, 391.

The question to be decided is whether the contract was a continuing guaranty.

If there is no ambiguity in the agreement itself, the answer must be found from the terms of the instrument alone, but as the language used is open to more than one construction, resort may be had to extrinsic evidence to determine the intent of the parties. *Bent* v. *Hartshorn*, 1 Met. 24. *Sullivan* v. *Arcand*, 165 Mass. 364.

It appears that Joseph Sherin, the debtor, desiring to buy goods on credit from the plaintiff, and it not being willing to open an account with him, at his suggestion the plaintiff wrote a letter to the defendant asking him if he would become responsible for the amount of the sale.

There is no evidence that before this time the defendant had been requested by Sherin to become a guarantor, and the letter must be considered as the first intimation or request made to him that he should so act.

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The language of the letter thus becomes important as expressing the nature of the pending transaction with Sherin which the defendant was asked to guarantee. It shows that the purchase intended is limited to goods bought on the day of its date, and though the phrase "you would guarantee any purchase he might make from us" is used, it is a part of the sentence which states the proposed sale and refers to it. And when the defendant had answered declining to become responsible, the reply of the plaintiff in explanation of its request, and referring to the contract of the debtor, contained this significant language, "he distinctly telling us to hold the goods which he might select until we received the guarantee."

If it was the purpose of the plaintiff to give Sherin a general credit for the sale of goods in the future for the payment of which the defendant should be bound, its letter contained no such statement, though it was written at a time when the proposed course of business between it and the debtor had been considered, and credit had been asked for by him.

Obviously, when the guaranty was given, the defendant well might have understood that the debtor had contracted for specific goods on credit, and the plaintiff was unwilling to complete the sale by delivery until security for their payment had been given; and with this understanding he agreed to be liable for this transaction, but did not intend to become bound for succeeding purchases.

While it might be said that the plaintiff and Sherin really intended that the defendant should become responsible for a course of continuous dealing, and the language of the defendant's engagement might be found open to such a construction, yet looking at the conditions under which it was given, it is more consistent with a construction that all the defendant intended was to aid him in a single purchase of goods from the plaintiff, and as this was followed by payment the guaranty was fully satisfied. See *Boston & Sandwich Glass Co.* v. *Moore*, 119 Mass. 435; *Cutler* v. *Ballou*, 136 Mass. 337; *Sherman* v. *Mulloy*, 174 Mass. 41, 43.

This was the finding of the Superior Court, and as no error of law appears the judgment must be affirmed.

So ordered.

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CHARLES H. TRIPP *vs.* EDWARD L. MACOMBER, executor.

Bristol. October 25, 1904. — November 29, 1904.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Auditor's report. *Evidence*, Materiality, Declarations of deceased persons.

Where a rule to an auditor provides that his findings of fact shall be final, a motion to recommit his report is a proper method of raising questions as to the correctness of his rulings upon the admission or exclusion of evidence. If in such a case the trial judge refuses to recommit the report, and it appears that the questions of evidence were of such a nature as to have had an effect upon the auditor's findings, and the judge in refusing to recommit the report has given no reason for his refusal which shows it to have been made as a matter of discretion, this court will assume that the refusal was equivalent to a ruling that there was no error of the auditor in dealing with the questions of evidence, and will pass upon the correctness of that ruling.

In an action, by a son against the executor under his father's will, for wages alleged to have been promised and set aside for him by his father of $25 a month for eleven years and four months, in which the defence was that any services rendered by the plaintiff were not intended by him or by his father to create a pecuniary debt, it appeared, that the father left a widow and as his only son and heir the plaintiff, that the plaintiff was unmarried, that he went to work upon his father's farm with other laborers with the understanding that he was to work for his board, lodging, clothes and tobacco, that he had a little money of his own and from time to time his mother let him have small sums, that his father believing it to be unwise to let him have money declined to pay him any wages, although he paid some of the bills contracted by the plaintiff, and had said at different times that he had money saved up for him. *Held*, that evidence of the following kinds introduced by the defendant against the plaintiff's objection was admitted rightly: 1. Of facts relating to the property and circumstances of the plaintiff's father, including the provisions of his will, tending to show the nature of the contract between the plaintiff and his father. 2. Of the conduct of the plaintiff himself, having a bearing upon the weight of his own testimony. 3. Declarations of the plaintiff's father made in his lifetime to the defendant or to the father's sister, or contained in his will, which were competent under the provisions of R. L. c. 175, § 67.

CONTRACT on an account annexed for $3,400, for wages for eleven years and four months at the rate of $25 a month, which it was alleged that the plaintiff's father, the defendant's testator, promised to pay to the plaintiff and hold to his use subject to his order and call. Writ dated March 3, 1904.

The nature of the defence is stated in the opinion. In the Superior Court the case was referred to Arthur M. Alger, Es-

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quire, as auditor, with an agreement of the parties that his findings on facts were to be final, which was made a part of the order of the court appointing him.

The auditor found for the defendant, and the plaintiff filed the following motion: "And now comes the plaintiff in the above entitled cause and moves that the auditor's report in said case be set aside and a new trial granted for the reason that the auditor admitted incompetent and irrelevant testimony at the hearing of said cause, against the plaintiff's objection thereto, which testimony is set forth in the auditor's report."

The case was heard by *Harris*, J., who denied the motion, and found for the defendant. The plaintiff alleged exceptions, raising the questions stated in the opinion.

F. Wasserman, for the plaintiff.

H. B. Worth, for the defendant, submitted a brief.

BARKER, J. The cause was referred to an auditor whose findings of facts were to be final. If under these circumstances he made an error in the exclusion or admission of evidence the parties might have no means of correcting the error except by motion to recommit because of it, and, if upon the hearing of such a motion there should be a ruling that there was no error, by exception to such ruling. We construe the motion made by the plaintiff after the filing of the auditor's report to have been in effect a motion to recommit because of the auditor's alleged errors as to evidence at the hearing, and as properly bringing here for review the question whether the judge was right in refusing to recommit. At the same time we do not intimate that it necessarily is an error in law for a judge to refuse to recommit to an auditor a report which shows that he has erred in the admission or exclusion of evidence, even when the cause is sent to the auditor under such circumstances as are stated in the present bill of exceptions. When the auditor is appointed under the usual rule, and his report is evidence merely, the question of recommittal is one of discretion and the decision of the court upon it is not open to exception. *Kendall* v. *Weaver*, 1 Allen, 277. *Packard* v. *Reynolds*, 100 Mass. 153. *Butterworth* v. *Western Assur. Co.* 132 Mass. 489, 492. *Carew* v. *Stubbs*, 161 Mass. 294. *Craig* v. *French*, 181 Mass. 282, 284. But when the auditor's finding is to be final on questions of fact it has a different func-

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tion, and is to receive other treatment than a report made under the usual rule. See *Daley* v. *Legate*, 169 Mass. 257, 259. Unless it appears from the report itself or from some other evidence that the error was immaterial it would be unjust to affirm the report or to use it as the final means of fixing the facts upon which the rights of the parties are to be adjusted. When such a report comes in, stating the questions of evidence decided by the auditor, and it appears from the report itself that the questions of evidence were of a nature to have had an effect upon his findings, and it further appears from the record that no reason is given for refusing to recommit which shows that the refusal was made as a matter of discretion we are justified in assuming that the refusal was equivalent to a ruling that there was no error in the auditor's dealings with the questions of evidence, and in deciding upon the correctness of that ruling. This course we think consistent with our decisions upon the general subject. See *Kendall* v. *May*, 10 Allen, 59; *Fair* v. *Manhattan Ins. Co.* 112 Mass. 320; *Briggs* v. *Gilman*, 127 Mass. 530; *Eagan* v. *Luby*, 133 Mass. 543; *Collins* v. *Wickwire*, 162 Mass. 143. We now make no decision as to the course to be pursued if in case of an auditor's report where his findings of fact are to be final, it appears from the record that the refusal to recommit was made as an act of discretion.

The plaintiff, a son of the defendant's testator, sues to recover the sum of $3,400, which he alleges that his father when he died owed him for wages at the rate of $25 per month for eleven years and four months, which the plaintiff alleges his father promised to pay him and to hold subject to his order and call. In addition to a general denial the answer alleged that if any services were rendered they were not intended by either the plaintiff or his father to create a pecuniary debt. The answer also alleged payment and set up the statute of limitations.

At the auditor's hearing the plaintiff testified, among other things, that his father told him from time to time that he had deposited the plaintiff's wages in the bank and was holding such deposits subject to the plaintiff's order, and that just before his father's death his father told him that he had his wages to the amount of $3,400 deposited in the bank.

The father died on February 7, 1903, testate, leaving a widow,

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the plaintiff's mother, and the plaintiff his only son and heir at law. The plaintiff is unmarried, and at the time of the hearing was thirty-eight years of age. The auditor finds that in the year 1891 the plaintiff was working on the farm of an uncle and was discharged for intemperate habits, and then went to his father's farm and remained there until his father's death, doing general work with other laborers; that his father received him with the understanding to which he assented that he was to work for his board, lodging, clothes and tobacco; that he had a little money of his own, and that from time to time his mother let him have small sums. The report states that the father believing it to be unwise to let him have money expressly declined to pay him any wages, and told him that if he was not satisfied with the arrangement he could go elsewhere; also that the evidence showed that the father paid some of the bills which the plaintiff contracted, and that there was some testimony that the father said at different times that he had money saved up for the plaintiff.

The evidence admitted by the auditor against the plaintiff's objection was the testator's will, by which the income of his property went to his widow for life, and upon her death to the plaintiff for life, with remainder to his issue, or in default of such issue to the testator's sister. Also the defendant's testimony as to the items of property left by the testator and their value, particularly as to his bank deposits. Also the defendant's testimony that in the fall of 1903 he was employed by the testator to draw up the will, and that the testator then talked over his affairs with the defendant and said that he wanted to fix matters so that his property would not be squandered by his wife and son; that he said nothing about owing his son wages, or having money belonging to his son deposited for his son's benefit, or subject to his order; that thereupon the defendant drew the will which subsequently was probated; that after the funeral the defendant read the will to the plaintiff and his mother; that, although the mother said that she was dissatisfied because the plaintiff was not given something substantial, neither the plaintiff nor his mother referred to any claim which the plaintiff had against the testator's estate, and that subsequently the defendant saw the plaintiff a number of times and got him

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to sign probate papers, and that at these times the plaintiff said nothing about any claim, and never presented one until some time afterwards and then through an attorney. Also testimony of the testator's sister as to declarations made by him to her as to the amount of his bank deposits from time to time.

The evidence objected to is of three classes.

1. Facts relating to the property and circumstances of the testator, all of which were competent upon the question whether the contract between him and the plaintiff was that for which the latter contended or that set up by the defendant.

2. Conduct on the part of the plaintiff himself, which was competent to enable the auditor to weigh the plaintiff's own testimony.

3. Declarations of the testator, made in his lifetime either to the defendant or to the testator's sister, or contained in his will. All these declarations clearly were competent under the provisions of R. L. c. 175, § 67. *Brooks* v. *Holden*, 175 Mass. 137. See also *Dixon* v. *New England Railroad*, 179 Mass. 242, 246; *Huebener* v. *Childs*, 180 Mass. 483; *Hayes* v. *Pitts-Kimball Co.* 183 Mass. 262, 264. *Hyde* v. *Gannett*, 175 Mass. 177, holds merely that St. 1896, c. 445, now R. L. c. 175, § 67, does not make private conversations between husband and wife admissible.

Exceptions overruled.

ULYSSES S. G. CHERRY *vs.* CHARLES H. SPRAGUE.

Suffolk. November 15, 1904. — November 29, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Bills and Notes. Conflict of Laws. Evidence, Presumptions and burden of proof, Proof of foreign law.

An instrument containing an unconditional promise to pay a definite sum of money on a day certain is none the less a promissory note because it also contains a provision that unpaid interest shall bear interest at twelve per cent and that if an action is brought the customary attorney's fee shall be added to the amount of the judgment and taxed as part of the costs in the case.

A promissory note payable in another State and sent by mail to the payee in that State is governed by the law of the State in which it is received and is payable.

In the absence of evidence as to the law of another State, the common law of such

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State is presumed to be the same as that of this Commonwealth, and as to the statutory law there is no presumption.

By the common law of this Commonwealth, apart from statutory provisions, a third person placing his name on the back of a promissory note before delivery to the payee is liable as a joint promisor without demand on the maker or notice of non-payment, and it need not be proved that he received a consideration for putting his name on the note.

CONTRACT, on a promissory note set out in the first paragraph of the opinion, indorsed by the defendant before delivery. Writ in the Municipal Court of the City of Boston dated November 3, 1898.

The defendant demurred and answered. On appeal to the Superior Court the demurrer was overruled, and the defendant appealed. The case then was tried before *Bell*, J.

The plaintiff put in evidence the alleged note and a notary's certificate of protest, from which it appeared that the notary made demand and protested the note on August 19, 1895, and on the same day mailed a notice of protest to the defendant, addressed to the defendant at Boston, Massachusetts, without designating any street or number. It was agreed, that all the signatures upon the instrument were placed thereon in Massachusetts, and that it then was mailed in Massachusetts to the plaintiff in South Dakota; that at the time this was done the plaintiff held a promissory note signed by Odin Fritz, the maker of the note, for a greater amount, and that the instrument in question was signed and mailed to the plaintiff, in accordance with an agreement which had been made by the plaintiff, Fritz and the defendant, in renewal of the larger note, on which a cash payment had been made by Fritz which reduced the original note to the amount of the note in suit. The plaintiff then rested and no other evidence was introduced.

It then was agreed, that, if on the evidence the plaintiff was entitled to a verdict, the judge should direct a verdict for the plaintiff in the sum of $300; otherwise, that the judge should direct a verdict for the defendant.

The defendant then asked the court to rule as follows:

1. The instrument declared on is not a promissory note.

2. If, in accordance with an agreement with the plaintiff, the instrument in question was signed by Odin Fritz in Massachusetts, and was mailed in Massachusetts to the plaintiff by the

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defendant, the validity of the instrument is to be determined by Massachusetts laws.

3. If the indorsement of the defendant was placed upon the instrument in Massachusetts, the question whether the defendant is liable thereon is to be determined by Massachusetts laws.

4. If the indorsement of the defendant was placed upon the instrument in Massachusetts, the defendant is not liable thereon.

5. If, at the time the defendant placed his name upon the back of the instrument in question, Fritz was indebted to the plaintiff for the amount stated in the face of the instrument, for which amount the plaintiff held the note of Fritz, it must appear affirmatively that there was a consideration for the defendant so placing his name upon the instrument; otherwise, the verdict must be for the defendant.

6. There is no evidence of due presentment.

7. There is no evidence of due notice of non-payment to the defendant.

8. The instrument became due August 16, 1895.

The judge gave the instructions numbered 6, 7 and 8 and refused to give the others, and further ruled as follows:

1. The instrument in suit was payable in South Dakota and was therefore governed by the laws of that State.

2. Unless proof is offered to the contrary, the law of South Dakota is presumed to be the same as the common law of this Commonwealth, but there is no presumption that the statute law of the two States agrees.

3. Under the common law of this State the defendants were joint makers of the note and not entitled to have a demand made on the maker and notice of non-payment given to them.

4. If a demand and notice were necessary it was not seasonably made, as the law merchant requires a demand on Saturday when a note falls due on Sunday.

5. There is no evidence that the law of South Dakota is different.

The judge, in accordance with the agreement above stated, ordered a verdict for the plaintiff in the sum of $300. The defendant alleged exceptions.

C. H. Sprague, pro se.

A. H. Read, W. J. Gaffney & C. A. Mendall, for the plaintiff.

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BARKER, J. The instrument declared on as a promissory note is of the following tenor:

"$218.00. Sioux Falls S. D. April 15, 1895.

"Four months after date for value received I promise to pay to the order of U. S. G. Cherry, Two Hundred and Eighteen Dollars, with interest at six per cent per annum, at the Union National Bank, Sioux Falls, South Dakota.

"Unpaid interest shall bear interest at twelve per cent, and if suit is commenced the customary attorney's fees shall be added to the amount of the judgment and taxed up as part of the costs in the cause.

"Due Aug. 15, '95.
No. 3682 Odin Fritz."

Indorsements: "Charles H. Sprague.
C. Everett Washburn.
U. S. G. Cherry."

The instrument contains an unconditional promise to pay at a day certain the definite sum of $218 with interest at six per cent per annum from August 15, 1895, to the order of the plaintiff. If this were all it would of course be a promissory note. But the additional stipulations do not change the promise into a conditional one in any respect, and they relate solely to the manner in which the unconditional promise to pay the definite sum may be enforced, if broken. This distinguishes the case from *Haskell* v. *Lambert*, 16 Gray, 592, *Costelo* v. *Crowell*, 127 Mass. 293, *Sloan* v. *McCarty*, 134 Mass. 245, and *Moore* v. *Edwards*, 167 Mass. 74. In each of those cases the added stipulations made the contract conditional, or the promise one to pay an indefinite amount, or not to pay the sum named absolutely and at all events. It is settled that the incorporation into an instrument which contains an unconditional promise to pay a definite sum of money of additional stipulations does not of itself necessarily deprive the instrument of the character of a promissory note. A recital that an additional rate of interest will be paid after maturity and that the maker has deposited certain collateral, and a statement of the terms upon which the collateral has been deposited, and on which it may be sold upon non-payment of the note does not have that effect. *Towne* v. *Rice*, 122 Mass. 67, 73, 75, and cases cited. The test is that in-

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timated by Mr. Justice Field in *Sloan* v. *McCarty*, *ubi supra*. If the additional stipulation relates to the manner in which the unconditional promise to pay a definite sum may be enforced, and does not change the promise from one to pay that sum absolutely and at all events, or change the general nature of the whole contract, the instrument is a promissory note notwithstanding the additional stipulations, relating to the manner of enforcement of the promise, if it shall be broken.

In the present instance, as the action is brought by the original promisee it is of no importance whether the instrument is negotiable or non-negotiable, and we do not consider or decide that question.

As the instrument was a promissory note and as it was payable in South Dakota and was sent to the payee by mail and received by him in that State it was a South Dakota and not a Massachusetts contract. *Nashua Savings Bank* v. *Sayles*, 184 Mass. 520, 522, and cases cited. *Callender, McAuslan & Troup Co.* v. *Flint*, *ante*, 104.

It is contended upon the plaintiff's brief that by the law of South Dakota the stipulation as to an attorney's fee was void, and the instrument a negotiable promissory note; and further that under the statute of that State, the eighteenth day of August, 1895, being a Sunday, the note matured on August 19, 1895, the day on which it was protested for non-payment. The brief cites in support of these contentions the cases of *Chandler* v. *Kennedy*, 8 So. Dak. 56, and *National Bank of Commerce* v. *Feeney*, 9 So. Dak. 550, and the Revised Civil Code of South Dakota, 1903, § 2236. But the bill of exceptions upon which the case is here contains no statement of these citations nor of any evidence of the law of South Dakota, and it is apparent that the decision of the judge was made without taking into consideration the cases and the statute mentioned, and that we cannot consider them.

No proof as to the law of South Dakota having been offered the judge was right in ruling that the common law of that State is to be presumed to be the same as that of this Commonwealth and that there is no presumption that the statutory law of the two States is the same. *Kelley* v. *Kelley*, 161 Mass. 111. *Olds* v. *City Trust, Safe Deposit & Surety Co.* 185 Mass. 500.

Therefore we are to determine whether the rulings of the court

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below should be set aside as contrary to the common law of this State. Examining them with this view we are of opinion that the defendant has no just ground of exception.

His requests that there was no evidence of due presentment, or of due notice to the defendant of non-payment, and that the instrument became due on August 16, 1895, were given, and he has no exception on those points. His contentions that the validity of the instrument and the question whether he is liable thereon are to be determined by Massachusetts statutes are disposed of by the doctrine of *Nashua Savings Bank* v. *Sayles*, *ubi supra*. His other requests and his exception to their refusal and to the ruling that under the common law of this State the defendant was a joint maker of the note and not entitled to demand and notice of non-payment are disposed of by our decisions which show that by the law of this State aside from statutory enactments a third person placing his name on the back of a promissory note before delivery to the payee is an original promisor or maker, not entitled to have demand or notice of non-payment and that as to him no consideration need be proved. *Sumner* v. *Gay*, 4 Pick. 311. *Woods* v. *Woods*, 127 Mass. 141. *Spaulding* v. *Putnam*, 128 Mass. 363.

The same considerations which require the overruling of the exceptions dispose of the questions raised by the demurrer.

Exceptions overruled; order overruling demurrer affirmed.

ELLEN B. WELCH *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 8, 1904. — December 8, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence. Elevated Railway.

It is no evidence of negligence on the part of an elevated railway company operating a train in a subway, that while the train was stopping at a station in the subway, where a curve of the track increased the space between the platforms of the cars on the outer side of the curve, a woman passing from one car to another, and not looking down to see the width of the space between the cars, fell

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and was injured by reason of one of her legs going down into the space as far as her knee, and that she saw no guard or other employee of the railway company on either of the car platforms before she fell. Whether on these facts the woman could have been found to be in the exercise of due care, *quære*.

TORT for personal injuries alleged to have been received in the subway in Boston while the plaintiff was a passenger on an elevated train of the defendant. Writ dated February 27, 1902.

At the trial in the Superior Court before *Mason*, C. J., the plaintiff testified that she entered the Scollay Square station of the defendant for south bound trains about five o'clock in the afternoon on February 8, 1902; that she boarded the front platform of the last car of the train, and took a step or two in that car before she discovered that it was the smoking car; that she then turned and started across to the next car ahead, and while crossing between the cars her left leg went down into the space between the cars to her knee, and she fell, receiving the injuries alleged; that there were several persons ahead of her and she did not see the space; that she saw no guard or other employee of the defendant on either of the car platforms before she fell; and that the train was standing at the station on a curve which made the space between the cars wider than when the cars were on a straight part of the track. There was no other testimony as to the width of the space between the cars. On cross-examination, the plaintiff testified that she did not look down to see how great a space there was between the cars as she was crossing. The plaintiff's testimony was corroborated by that of her daughter who was with her at the time of the accident, and there was no other testimony on the subject.

At the close of the plaintiff's case, the judge ruled that upon this evidence the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. Burns, W. W. Clarke & J. F. Lynch, for the plaintiff.

R. A. Sears & H. Bancroft, for the defendant.

BY THE COURT. The testimony of the plaintiff and her daughter furnished no evidence of negligence on the part of the defendant. It is at least very questionable whether there was any evidence that the plaintiff was in the exercise of due care.

Exceptions overruled.

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MARY FLEMING *vs.* JOHN R. MORRISON & another.

Essex. November 1, 1904. — December 15, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Will, Execution and attestation. *Evidence*, Extrinsic affecting writings.

If a man, having signed an instrument purporting to be his will leaving all his property to a certain woman, and having acknowledged it as his will before one attesting witness intending not to complete the instrument or to make it a valid will but merely to use it to induce the woman named as legatee to sleep with him, afterwards decides to make the instrument a valid will and with such intention acknowledges it as his will before two other witnesses who attest it as such, the instrument cannot be allowed as a will, as it has been acknowledged before and attested by only two witnesses when the attempting testator had the intention of making it his will.

The statements in an instrument purporting to be a will, that it was executed by the person named as testator as his will and was declared by him to be such in the presence of three witnesses whose names are subscribed, can be contradicted by oral testimony showing that the person named as testator, when he signed the instrument in the presence of one of the three witnesses and when that witness signed, did not intend to make the instrument a valid will by acknowledging it before two other witnesses and having it attested by them.

APPEAL from a decree of the Probate Court for the county of Essex made on April 27, 1903, allowing a certain instrument as the last will and testament of Francis M. Butterfield, late of Lynn.

The case was heard by *Loring*, J., who found that the testator was of sound mind, that no undue influence was exercised, and that the will was executed properly. At the request of the contestants, he reported the case for determination by the full court.

The report contained the following findings of the justice referred to in the opinion:

"I find that on or about May 18, 1901, Francis M. Butterfield called upon Sidney S. Goodridge and requested him to draw up his will, leaving all his property to the Mary Fleming named in the instrument admitted to probate as the will of said Butterfield. Thereupon said Goodridge drew up the said instrument, said Butterfield signed it, and said Goodridge attested and subscribed said instrument as a witness to the signature of said Butterfield. Before Butterfield and Goodridge parted, Butterfield told Goodridge that this was a 'fake' will, made for a purpose.

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"I find by the evidence in this case that said Butterfield meant by this that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him, said Butterfield, to sleep with her. Afterwards said Butterfield determined to complete the execution of his will, and for that purpose he produced the instrument before the other two attesting witnesses, Bryant and Cheney, told them it was his will, that the signature was his signature, and asked them to attest and subscribe it as witnesses. Goodridge, Bryant and Cheney were all competent witnesses.

"I find that the words appointing Mary Fleming as 'administratrix' were written on the instrument after it was attested and subscribed by Bryant and Cheney."

The instrument offered as a will was as follows:

"Be it remembered that I, Francis M. Butterfield of Lynn, County of Essex *of Massachusetts* in the Commonwealth of Massachusetts, being of sound mind and memory, but knowing the uncertainty of this life, do make this my last will and testament, this 18th day of May, 1901.

"After the payment of my just debts and funeral charges, I bequeath and devise as follows:

"To Mary Fleming of Lynn State of Massachusetts all of My Possessions at My death of all Real *est* and personal property and all that May Come to Me after My death.

"Francis M. Butterfield.

"I appoint Mary Fleming my Administratrix.

"In testimony whereof I hereunto set my hand and in the presence of three witnesses declare this to be my last will this 18th day of May 1901 day of 1901 in the year one thousand and Nine hundred and one.

"On this 18th day of May *day of May* A. D. 1901 Lynn State of Massachusetts *Massachusetts*, signed the foregoing instrument in our presence, declaring it to be his last will: and as witnesses thereof we three do now, at his request, in his presence, and in the presence of each other, hereto subscribe our names.

"Sidney S. Goodridge,
Eron J. Bryant,
Zella J. Cheney."

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W. B. Murphy & H. T. Lummus, (*J. W. Berry* with them,) for the appellee. Witnesses attest the formal act of signing, not the intent. See *Osborn* v. *Cook*, 11 Cush. 532; *Baxter* v. *Abbott*, 7 Gray, 71, 82. A deed signed and attested with the expectation of never completing it by delivery becomes a valid attested instrument if delivered. If the *animus testandi* exists when a paper acquires vitality by the attestation of the third witness the instrument is a valid will, whatever the state of mind of the testator was before that time.

H. P. Harriman & J. F. Neal, for the appellants.

LORING, J. All the rulings asked for at the hearing have been waived, and the only contention now insisted upon by the contestants is that on the finding made at the hearing the proponent of the will has failed to prove the necessary *animus testandi*. We are of opinion that this contention must prevail.

The finding that before Butterfield and Goodridge "parted" Butterfield told Goodridge that the instrument which had been signed by Butterfield as and for his last will and testament and declared by him to be such in the presence of Goodridge, and attested and subscribed by Goodridge as a witness, "was a 'fake' will, made for a purpose," is fatal to the proponent's case. This must be taken to mean that what had been done was a sham. This is not cured by the further finding that what Butterfield meant by this was "that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him, said Butterfield, to sleep with her."

This is not a finding that Butterfield intended to sign the instrument before Goodridge as and for his last will and testament, leaving the further execution to depend on future events. Much less is it a finding that Butterfield changed his mind after he had signed and had had Goodridge attest and subscribe the instrument. The whole finding taken together amounts to a finding that Butterfield had not intended the transaction which had just taken place to be in fact what it imported to be, that is to say, a finding that when Butterfield signed the instrument and asked Goodridge to attest and subscribe it as his will he did not in fact then intend it to be his last will and testament but intended to have Mary Fleming think that he had made a will in her favor to induce her to let him sleep with her.

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We are of opinion that it is competent to contradict by parol the solemn statements contained in an instrument that it is a will, that it has been signed as such by the person named as the testator and attested and subscribed by persons signing as witnesses. *Lister* v. *Smith*, 3 Sw. & Tr. 282. *Nichols* v. *Nichols*, 2 Phill. 180. *In the Goods of Nosworthy*, 11 Jur. (N. S.) 570. For similar cases as to wills, see *In the Goods of Hunt*, L. R. 3 P. & D. 250, where it was held that it could be shown by parol that the instrument executed was executed by mistake; and *Hubbard* v. *Alexander*, 3 Ch. D. 738, where it was held that one of two codicils duly executed was intended to be a duplicate. It was lately held by this court that a written agreement, duly executed, could be shown to have been delivered on a condition. *Elastic Tip Co.* v. *Graham*, 185 Mass. 597. And see the cases there cited.

"The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said," in the words of Sir J. P. Wilde, in *Lister* v. *Smith*, 3 Sw. & Tr. 282, 288. In fact that learned judge went so far as to say that it was so dangerous a kind of evidence and that it was so difficult to impress on a jury "the enormous weight which attaches to the document itself as evidence of the *animus* with which it was made," that although he was prepared in that case to act on the finding of the jury, he was "far from saying that the court will in all cases repudiate a testamentary paper simply because a jury can be induced to find that it was not intended to operate as such."

We cannot accede to the argument of the proponent that a will is like a deed where witnesses are required to the signature of the grantor. In that case it is enough that the instrument is complete when delivered. But in case of a will there is no delivery of the instrument. The *punctum temporis* in case of a will is when it is signed, or, having been signed previously, when the signature is acknowledged in the presence of three or more witnesses. And where that is done before each witness separately, (as it may be done in this Commonwealth, *Chase* v. *Kittredge*, 11 Allen, 49,) the *animus testandi* must exist when it is signed or acknowledged before and attested and subscribed by each of the necessary three witnesses. If this is not done the statutory requirements have not been complied with.

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Assuming that the acknowledgment *animo testandi* of a signature not originally made with that *animus* is enough, the will in the case at bar would have been duly executed had Butterfield subsequently acknowledged the instrument before three in place of two additional witnesses. But he did not do so. The instrument having been acknowledged and attested and subscribed by two witnesses only is not a valid will within R. L. c. 135, § 1.

It has not been argued that the want of the necessary *animus testandi* is not open under the terms of the first reason of appeal. Although the question here discussed was not raised at the hearing by the rulings requested by the contestants, it was considered by the presiding justice and is presented by the ruling made on his finding. The case does not come within *Holbrook* v. *Young*, 108 Mass. 83, relied on by the proponent.

Decree to be entered reversing decree of Probate Court, and disallowing the instrument as the will of Butterfield.

MANUEL A. GOMES *vs.* NEW BEDFORD CORDAGE COMPANY.

Bristol. October 24, 1904. — January 2, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability. *Evidence*, Opinion: experts.

It is evidence of negligence on the part of the proprietor of a cordage factory, that he has failed to replace a wooden box which usually covers a cog wheel gearing on a spinning frame but which has been removed because broken, and he may be held to be liable to a workman whose hand is injured by coming in contact with the cog wheel while moving a shipper fork to shift a belt in an ordinary way which would be perfectly safe if the box were in place. In such a case, if the workman has been called to this frame to take the place of a man temporarily absent and has no reason to suppose that any frame is without a box to cover the gearing, it cannot be said, as matter of law, that he is negligent in failing to discover the absence of the box or in taking hold of the fork to change the belt without looking carefully enough to notice that the box is gone, and the case is one to be presented to a jury.

In an action, by a workman in a cordage factory against his employer, for the cutting off of three of the plaintiff's fingers by a cog wheel gearing on a spinning frame while the plaintiff was moving a shipper fork to shift a belt of the machine, alleged to have been caused by the absence of the wooden box which usually covered the gearing, a witness for the plaintiff was asked "Is it possible

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for your hand to come in contact with these gears when the cover is on?" and answered "No." Another witness was asked "Would it be possible for a person to get his hand caught in gears while moving the shipper fork if the cover was on the box?" and answered "No." He also was asked "If you were putting on the belt and supposing the cover were on the box could you get caught in the gears?" and again answered "No." The defendant objected to the evidence, on the ground that the witnesses were not experts, and also on the ground that their opinions were asked on a matter not the proper subject of expert testimony. *Held*, that, although the subject of the inquiry was not a matter for expert testimony, the evidence was competent, not for the purpose of introducing the opinions of the witnesses as such, but as a simple and convenient mode of describing the parts of the machine which were important for the consideration of the jury.

TORT by a workman in a cordage factory, a native of the Island of Brava thirty-two years of age, for having three of his fingers cut off by the cog wheel gearing of a spinning frame while moving a shipper fork to shift a belt of the machine, with a count at common law alleging negligence of the defendant in setting the plaintiff at work in an unsuitable and unsafe place and near dangerous, unboxed and unguarded machinery, the unguarded condition of which was unknown to the plaintiff, and another count under the employers' liability act alleging a defect in the ways, works or machinery of the defendant. Writ dated March 13, 1901.

In the Superior Court the case was tried before *Hitchcock*, J. The evidence in regard to the happening of the accident is described sufficiently in the opinion.

The testimony admitted against the objection of the defendant, referred to in the last paragraph of the opinion, was as follows: One Lomba, called by the plaintiff, testified that he had worked at the defendant's factory for fifteen years but left a week before the time of the trial, and that on the morning of the accident and for some time previous he had worked on the same set of machines that the plaintiff was at work on when he was hurt. In the course of his direct examination he was asked the question "Is it possible for your hand to come in contact with these gears when the cover is on?" The defendant objected, but the witness was allowed to answer the question and answered "No."

One Gomez, called by the plaintiff, testified that he was no relation of the plaintiff, and that he had worked in the factory about nine years and still worked there. He was asked in direct

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examination "Would it be possible for a person to get his hand caught in gears while moving the shipper fork if the cover was on the box?" The defendant objected, but the witness was allowed to answer the question and answered "No." The witness then was asked in direct examination "If you were putting on the belt and supposing the cover were on the box could you get caught in the gears?" The defendant objected, but the witness was allowed to answer the question and answered "No."

At the close of the evidence the defendant asked the judge to rule that on the whole evidence the plaintiff could not recover under either count of his declaration, and to order a verdict for the defendant. The judge refused to rule as requested and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $1,500; and the defendant alleged exceptions, to the refusal of the judge to rule as requested and to the admission of the evidence above quoted. On the last point the defendant contended that the witnesses were not experts and also that the matter testified to was not a proper subject for expert testimony.

A. J. Jennings, (*A. E. Perry* with him,) for the defendant.

J. P. Doran, for the plaintiff.

KNOWLTON, C. J. The accident to the plaintiff happened from his putting his fingers in contact with a cog wheel, as he was moving a fork through which a belt ran, in order to throw off the belt. As the machine was constructed, there was a wooden box which covered the gearing in which his fingers were caught, but this box had been off for a considerable time before the accident. Its absence increased the danger to persons working about the machine, and the jury might have found that the defendant was negligent in leaving it off.

Another question is whether there was evidence that the plaintiff was in the exercise of due care. There was abundant evidence that he was in the performance of his duty, doing that which frequently was done by operators in running such machines, and which would have been perfectly safe if the box had been in its place. He testified that he supposed the box was there until his fingers were caught, and, if this part of his testimony is true, there is nothing to show that he was negligent,

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unless he was careless as matter of law in not discovering the absence of the box before his fingers touched the gearing.

The machines which he was tending were spinning frames, five in number, each frame being made up of two machines. They were set in a row, near together, with a narrow passage between them and the wall of the building, and with narrow passages between every two adjacent frames. The plaintiff was set to work to take the place of a man who was temporarily absent, and he had no reason to suppose that there was any frame without its box to cover the gearing. He had been at work on these machines only about three quarters of an hour when the accident happened. During this time he had been engaged in mending threads which broke upon some of the machines. It certainly cannot be said, as matter of law, that he was negligent in failing to discover the absence of the box from one of the frames, before he started to change the belt. It would be a mere chance if he discovered the defect while working as he was, in the short time before the accident.

Nor can we say, as he described the accident, that he was necessarily careless in taking hold of the fork to change the belt, without looking particularly enough to notice that the box was gone. We are of opinion that the evidence was rightly submitted to the jury.

If the questions objected to had been put to the witnesses as experts, they well might have been excluded, as the subject to which they relate is not a matter for expert testimony. But we do not understand that they were put for the purpose of introducing opinions as such. We suppose the questions were asked as a simple and convenient mode of obtaining a description of the machine, in reference to the parts which were important for the consideration of the jury. We are of opinion that the evidence was competent.

Exceptions overruled.

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ALBERT F. DEMONTAGUE *vs.* SOLOMON BACHARACH & another.

Suffolk. March 4, 1904. — January 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Contract, Implied: common counts. *Frauds, Statute of. Evidence*, Pleadings in another case. *Attorney at Law. Damages.*

If an action is brought to recover money paid under an oral contract not to be performed within a year, wrongfully terminated by the defendant at the end of ten months, and after a verdict for the plaintiff exceptions of the defendant are sustained by this court on the ground that the plaintiff has not shown that the oral contract has been made unenforceable by the defendant setting up the statute of frauds, and thereupon the plaintiff brings an action on the oral contract in which the defendant sets up the statute as a defence, in a new trial of the first action the plaintiff may put in evidence the record in the second action to show that the defendant has set up the statute as a bar to an action on the contract, and thus recover on the common count, although the setting up of the statute is in another action brought after the date of his writ.

In an action to recover the consideration paid under an oral contract, unenforceable by reason of the defendant having set up the statute of frauds when sued on it, the plaintiff can introduce in evidence the writ and pleadings in an action brought by him upon the oral contract to show that the defendant in that action set up the defence of the statute. The pleadings themselves until the record is extended constitute the only record of the case.

The preparation and filing of pleadings are presumed to be within the scope of the employment of an attorney at law appearing for a party to an action, and the statement of a ground of defence in an answer or demurrer must be held to be binding on the defendant, at any rate until the attorney is shown to have acted without authority.

The statute of frauds is a bar to an action for a breach of an oral contract not to be performed within a year, although the contract partly has been performed before the breach.

In an action for money paid under an oral agreement by which the plaintiff was to carry on a restaurant for a period of two years in connection with a bar room of the defendant, if it appears, that the defendant wrongfully terminated the arrangement at the end of ten months and when sued by the plaintiff for damages set up the statute of frauds, and, if it further appears, that the defendant received from the plaintiff payments of money to a large amount under the oral contract during the ten months before he repudiated it, the plaintiff in suing on the common counts is not entitled to recover necessarily the same amount of money that he paid, as the jury may find that the plaintiff derived benefit from the privilege of carrying on the restaurant in the bar room while he enjoyed it, which exceeded any benefit received by the defendant from the restaurant being

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carried on in connection with the bar, so that the damages to be recovered, if any, must be ascertained by an estimation of all these elements; and for this purpose the plaintiff can show that the privilege of carrying on the restaurant was worthless unless the defendant paid an agreed percentage on liquor sold there and that the defendant had not done this.

If one carrying on a restaurant in connection with the bar room of another at the request of the proprietor of the bar room employs and pays an additional servant to work at the bar preparing liquor to be served and drunk in the restaurant, and if on demand by the restaurant keeper for compensation on this account the proprietor of the bar room promises an adjustment of his claim, the proprietor of the bar room can be found to be liable to the restaurant keeper for the extra expense thus incurred.

If one carrying on a restaurant in connection with the bar room of another, upon complaint by the proprietor of the bar room that customers at the restaurant who desire liquor are not served promptly, furnishes, or performs personally in superintendence, services in the restaurant in regard to the serving of liquor without any promise of the proprietor of the bar room to pay for them, the services are voluntary and cannot support an action of contract for labor performed and furnished.

CONTRACT upon an account annexed of forty-seven items, twenty-five items for ten per cent of the gross receipts of a restaurant paid by the plaintiff to the defendants amounting to $430.43, ten items for money paid for gas bills amounting to $218.76, nine items for money paid for electric light bills amounting to $89.03, one item for money paid for one half of the salary of a porter amounting to $128, one item for extra help employed by the plaintiff for the benefit of the defendants amounting to $287, and one item for labor performed and furnished by the plaintiff as superintendent at the request of the defendants amounting to $375. Writ dated August 21, 1899.

At the first trial of this case before *Aiken*, J. the jury returned a verdict for the plaintiff, and the defendants alleged exceptions which were sustained by this court in a decision reported in 181 Mass. 256. After the bringing of the action mentioned in the opinion, in which the defendants demurred to the declaration on the ground that the plaintiff alleged an oral contract that was not to be performed within a year, this case again was tried before *Aiken*, J., who, at the close of the plaintiff's case, ordered a verdict for the defendants on all the items of the account. The plaintiff alleged exceptions.

The case was argued at the bar in March, 1904, before *Knowlton*, C. J., *Morton*, *Hammond*, *Loring*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

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James J. McCarthy, for the plaintiff.

H. H. Baker, (*H. M. Williams* with him,) for the defendants.

BRALEY, J. At the time of the verbal contract between the parties, the defendants were in occupation of a furnished restaurant and liquor saloon in which they were doing business as common victuallers. It then was mutually agreed that the plaintiff, during the remaining two years of the written lease under which the defendants held the premises, should have the privilege of conducting the restaurant expressly for his own profit, while the defendants retained control of the portion used for the sale of liquors. They also were to pay him one tenth of all receipts for liquor sold and served at his tables, until he began his payments to them, when this amount was to be increased to one fifth. The plaintiff engaged to furnish all materials and labor required in his business, and also to pay one half the salary of a porter in their employment, and all bills for gas used on the leased premises. But he was not to pay rent or other compensation until his undertaking had become sufficiently profitable to permit it, when the defendants were to receive one tenth of his gross receipts.

The exceptions recite that "about the last of June, 1899, . . . and after the plaintiff had run the restaurant about ten months, . . . he was compelled to stop by the defendants; that the agreement made between him and the defendants was broken and repudiated by the defendants without fault on his part, and that full performance of the contract was prevented by the defendants," and "no payments of any kind ever have been made by the defendants to the plaintiff, and nothing of value other than the use and enjoyment of the premises and utensils ever has been received by the plaintiff from the defendants." It further appears that during this time the plaintiff made the payments called for by the contract.

In the litigation that followed to recover the money paid, it was held that the plaintiff could not prevail, for the reason that he could not rescind the contract, as it was impossible for him to return the benefit received. Nor could the action be maintained to recover what he had paid. For if the contract was oral, and within the statute of frauds, and it had been broken by the defendants, yet the statute had not been pleaded, and until

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this defence had been interposed the contract could be enforced, and an action would not lie to recover the consideration. *DeMontague* v. *Bacharach*, 181 Mass. 256.

Following this decision, the plaintiff brought a second action to recover damages for breach of the contract, to which the defendants by demurrer set up the defence that it was within the prohibition of the statute of frauds. But no further steps were taken, and the plaintiff then proceeded to try again the first action, which is the case now before us.

The pleadings, so far as they are material, consist of a count on an account annexed of forty-seven items, to which the answer is a general denial, and it is admitted by the plaintiff that of these all but eleven are for payments made by him under the contract. In the bill of exceptions no reasons are stated on which the ruling that the plaintiff could not recover was given. The inference, however, is that the evidence offered was excluded, and a verdict for the defendants finally was ordered on the plaintiff's evidence, because it was open to the defendants under their answer to assert, that he had failed to prove that any of these items constituted a cause of action, as they were covered by an express contract. *Rodman* v. *Guilford*, 112 Mass. 405. *McDonald* v. *Sargent*, 171 Mass. 492.

Up to this point of the trial, whenever reached, there was no occasion for the plaintiff to prove that the defendants had resorted to the statute; but when it appeared that this part of the declaration was covered by the contract, the plaintiff was obliged either to amend by declaring on the contract itself, if it was still in force, or submit to a verdict to this extent in the defendants' favor. Instead of amending he sought to prove that the defendants had avoided the contract by setting up this defence in the action on the agreement. *Mullaly* v. *Austin*, 97 Mass. 30, 33. *DeMontague* v. *Bacharach*, *ubi supra*.

For this purpose the plaintiff offered in evidence the writ and pleadings in that case, which were excluded on the objection of the defendants, who now insist that it was not open to the plaintiff to show a resort by them to the statute, unless pleaded in the action on trial. They further claim that this evidence was incompetent as proof that they had availed themselves of such a defence in the second action.

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It has been held that the statute cannot be relied on unless pleaded, *Middlesex Co.* v. *Osgood*, 4 Gray, 447, *Graffam* v. *Pierce*, 143 Mass. 386, *Brown* v. *Magorty*, 156 Mass. 209, and the better practice undoubtedly is to declare at the same time not only on the contract, but also upon the appropriate common count if this defence is anticipated. Yet a general denial, where the latter alone was used, placed the burden of proof on the plaintiff, who could, under an account annexed, introduce the contract that had been repudiated to prove payments made by him under its terms; and although it was not in issue on the face of the pleadings, he could not prove his case without its appearing in evidence. *Basford* v. *Pearson*, 9 Allen, 387, 391. *Mullaly* v. *Austin*, *ubi supra*. *Fitzgerald* v. *Allen*, 128 Mass. 232, 234.

After the former decision the declaration might have been amended by adding a count covering the issue raised by the second action, but the plaintiff, at least in the absence of a plea in abatement, could pursue the defendants by separate actions founded upon different legal conceptions of his cause of action. If the first action had been for damages for breach of the contract, instead of for money paid, and upon the statute being interposed judgment had been entered for the defendants, and a second action then had followed to recover the consideration, the last action would not have been defeated because it did not appear by the pleadings therein that the defendants relied upon such a defence.

In this case the order of trials was reversed, and the plaintiff cannot recover without proving that the defendants repudiated the contract by a reliance on the statute. But they could not prevent his recovery by simply omitting to set up the statute in their answer; as pleading such a defence here would be clearly inappropriate and mere surplusage. After the former decision which gave them the power of choice either to abide by the contract, or to avoid it, an election to avoid, regularly and properly pleaded by way of demurrer in the second action in which this issue alone arose, was sufficient.

When an action at law is brought, and prosecuted in the usual manner, the appearance of counsel for the defendant, and the preparation and filing of proper pleadings, are presumed to be regular, and strictly within the scope of the attorney's em-

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ployment. Such acts, so far as they definitely fix the legal grounds of his client's defence must be held to bind his principal at least until it is shown that he acted without authority. *Loomis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 39, 44. *Currier* v. *Silloway*, 1 Allen, 19. *Gordon* v. *Parmelee*, 2 Allen, 212. *Jones* v. *Howard*, 3 Allen, 223, 224.

Until formally extended the papers offered in evidence were the only record of the case, and showed that the defendants had pleaded the statute. Nor does it appear that after this had been done there was any denial of the apparent authority of their counsel, or refusal by them to be bound by the action taken. *Bogle* v. *Chase*, 117 Mass. 273, 275.

The cases of *Dennie* v. *Williams*, 135 Mass. 28, and *Farr* v. *Rouillard*, 172 Mass. 303, on which the defendants rely as authorities for the exclusion of the evidence, were actions against a constable, and the sureties on his bond, to enforce the payment of a judgment recovered against him. To prove that he had acted by virtue of his office, the plaintiff offered in evidence the answer in the original action in which such an allegation had been made. It was held that the answer was not evidence against the constable, as it did not appear that his attorney had been particularly instructed to make such defence.

But in neither case was any general rule formulated that pleadings, signed by an attorney, in another action, were to be held inadmissible for any purpose in subsequent litigation between the parties.

In the case at bar the record was not offered to prove the truth of allegations of fact stated in a pleading, but to show the fact that the defence of the statute had been set up in the other action.

When once taken, the plaintiff had a right to regard this defence as expressing an unconditional act that barred the maintenance of that action, and authorized him to treat the agreement as unenforceable. *Williams* v. *Bemis*, 108 Mass. 91, 93. See *Freeman* v. *Foss*, 145 Mass. 361.

In the opinion of a majority of the court, it was competent for him to prove by the record of the subsequent case that the defendants had pleaded the benefit of the statute, and the exclusion of this evidence was wrong.

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If it had been admitted, the plaintiff would have shown with the accompanying proof that the defendants had received payments of money to a large amount from him, under an oral contract which they had refused to perform fully, and that could not be enforced by reason of the statute of frauds. Pub. Sts. c. 78, § 1, cl. 5. They thus had rendered further performance by him impossible, and there is left for discussion the extent to which the plaintiff can recover the payments made.

Although the contract had been repudiated while in the course of performance, and there was only a partial failure of consideration, it was not taken out of the statute, and he could not maintain an action at law for damages. *Kidder* v. *Hunt*, 1 Pick. 328. *Thompson* v. *Gould*, 20 Pick. 134, 138. *Hill* v. *Hooper*, 1 Gray, 131, 133. *Marcy* v. *Marcy*, 9 Allen, 8, 12. See *Bassett* v. *Percival*, 5 Allen, 345, 347.

As the benefit of the statute is not waived, and the contract, though partly executed, thus becomes unenforceable, so the extent to which it has been performed affects only the measure of recovery. The defendants were at liberty to perform fully; but by choosing to stop with a partial performance, and then resorting to the statute, they cannot retain the entire consideration which was paid to them on the basis of a full performance, unless it appears that the plaintiff has received an equivalent for the benefit conferred upon them. *Dix* v. *Marcy*, 116 Mass. 416, 417, and cases cited. *Miller* v. *Roberts*, 169 Mass. 134. See also in this connection *Riley* v. *Williams*, 123 Mass. 506; *Kelley* v. *Thompson*, 181 Mass. 122, 124.

If the plaintiff, though not in default, cannot enforce the contract itself, but must declare on one of the common counts, or on an account annexed, in order to recover the money paid, he may not be able to recover the entire amount. A jury might find that he derived some benefit at least from the privilege which he was allowed to enjoy for nearly a year. While the defendants must compensate him for any benefit they have received, yet this is ascertained after deducting the value of what he already has obtained, and may result in their favor, if it is found to be sufficient to offset what he has paid. Or they may be required to return the whole, or a part, of the money paid to them. He is entitled therefore to maintain his action as to the

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items that include this sum for the purpose of determining this question, and the defendants cannot rely upon a contract which they have avoided as a bar to such an accounting. *Williams* v. *Bemis*, 108 Mass. 91. *White* v. *Wieland*, 109 Mass. 291. *Dix* v. *Marcy*, 116 Mass. 416. *Dowling* v. *McKenney*, 124 Mass. 478, 481. *Fitzgerald* v. *Allen*, 128 Mass. 232. *Freeman* v. *Foss*, 145 Mass. 361. *Kelley* v. *Thompson*, 181 Mass. 122.

It also is plain that the evidence offered by the plaintiff, and excluded, to the effect that the privilege of carrying on the restaurant was worthless unless the defendants paid the percentage on liquor sold, which they had not done, became relevant and admissible, as it tended to prove the value of their partial performance of the agreement. *Dix* v. *Marcy* and *Dowling* v. *McKenney*, *ubi supra*.

This leaves for consideration the remainder of the declaration which, with the exception of item forty-five for money paid as one half of the salary of a porter, is composed of items thirty-six to forty-seven inclusive, and of these all but two are for money paid by the plaintiff on account of electric lighting and repairs of electrical apparatus and fixtures. But as he was content to leave them with no evidence to support his contention that the defendants were liable to repay him, a verdict on these items in their favor was ordered rightly.

In item forty-six he seeks to recover disbursements for additional domestic service, and in item forty-seven for the value of labor either furnished or performed by him in superintendence, under requests made at different times by the defendants and upon their complaint that customers who desired liquor were not served promptly.

From the plaintiff's uncontradicted evidence it could have been found that the sale of liquors in connection with the business of the restaurant, though of benefit in retaining a class of customers that otherwise might not have patronized him, was of greater profit to the defendants. If an examination of the whole case makes it obvious that both parties from the beginning contemplated that the business of each should be managed with a proper regard for the success of the other, yet in conducting the restaurant, the retention and increase of this patronage may have been of greater importance to the defendants than to him.

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Under such conditions if no increase of help in his branch of the enterprise was required, but, at the request of the defendants and to facilitate and increase their traffic, he employed and paid an additional servant who worked at the bar, preparing liquor to be served and drunk in the restaurant, when such service should have been rendered by them, and in response to a demand made for payment they did not deny liability, but promised an adjustment of his claim, a contract to pay for the service shown by this item fairly could be found. At least the question whether such a contract had been proved should have been submitted to the jury. The labor performed and furnished under item forty-seven was voluntary, and no express or implied promise to pay therefor appears, and the verdict on this item must stand. *Gassett* v. *Glazier*, 165 Mass. 473, 480, and cases cited. See *Devine* v. *Murphy*, 168 Mass. 249, 251.

The exceptions must be sustained and a new trial ordered on all the items covered by the contract, and also on item forty-six, and they are overruled as to the other items.

So ordered.

WILLIAM PALMER *vs.* PATRICK COYLE.

Bristol. October 24, 1904. – January 3, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Master and Servant. Negligence, Employer's liability. *Animal.*

If a baker employing a large number of men tells the driver of one of his wagons that in his absence he can ask his brothers for any further instructions as to conducting the business that may be necessary, and in consequence of this direction the driver asks one of the baker's brothers about an assistant to aid on the team in the delivery of goods to take the place of a boy then absent, and says that he probably can get a boy, to which the baker's brother replies "all right," and if the driver previously has told the baker himself that he probably could get a certain boy named, to which the baker replied "all right," and thereupon the driver asks the boy whom he has named to the defendant to accompany him as an assistant and tells him that he will receive certain wages, and the boy complies, and is injured on the first day of his employment, it can be found that the boy was hired by the driver either with the knowledge and assent of the baker, or of his brother who had authority to act for him in his

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absence, and that the boy was the servant of the baker at the time of his injury.

In an action by a boy employed as an assistant on a baker's wagon against his employer, for an injury from being kicked by a horse of the defendant drawing the wagon when hit on the heels by the whiffletree upon the breaking of the breeching strap near a buckle, if it appears that the whiffletree would not have come in contact with the horse had not the breeching strap broken as it did and that the harness was an old one, there is evidence to go to the jury on the issue whether the harness was defective.

Evidence of single instances of misconduct on the part of a horse, such as kicking and running away, is admissible to show that the general character of the horse is vicious.

Whether a horse on account of habits of shying and running away is more likely to behave in a vicious manner when a wagon presses against him and a whiffletree drops on his heels is a question of fact for the jury.

In an action by a servant against his employer for injuries from being kicked by a horse of the defendant alleged to be vicious, whose viciousness it is alleged the defendant by the exercise of reasonable care ought to have known, after evidence of specific instances of misconduct on the part of the horse, such as kicking and running away, further evidence of the reputation of the horse is admissible to prove the defendant's knowledge of his vicious qualities. For this purpose it is competent to show that because of such propensities the horse was driven with another horse by the defendant's servants as it was not thought safe to drive him alone, and also to show a conversation in the defendant's presence in which the horse was referred to as a "runaway."

TORT, by a boy eleven years old when injured, against his employer, for injuries from being kicked by a horse alleged to be vicious, driven in a baker's wagon of the defendant by the plaintiff's uncle by marriage, to assist whom the plaintiff had been employed, with three counts described in the first paragraph of the opinion, one of which, under the employers' liability act, was waived as there stated. Writ dated July 9, 1902.

At the trial in the Superior Court before *Hitchcock*, J., it appeared, that the accident happened in the town of Mansfield, and that while the plaintiff's uncle by marriage was driving the defendant's horse out of a yard in that town the breeching strap on the harness broke near a buckle and the whiffletree hit the heels of the horse, who began to kick and run and almost at the first kick broke the plaintiff's leg. The evidence admitted against the objection of the defendant, in regard to the former acts and reputation of the horse, and that in regard to the employment of the plaintiff, are described sufficiently in the opinion. At the close of the evidence, the defendant asked the judge to rule that upon all the evidence the plaintiff was

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not entitled to recover. The judge refused to rule as requested, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $3,000. The defendant alleged exceptions.

F. S. Hall, (*R. P. Coughlin* with him,) for the defendant.

W. A. Swift, (*J. B. Tracy* with him,) for the plaintiff.

BRALEY, J. At the close of the evidence the plaintiff waived the third count of his declaration in which he sought to recover under R. L. c. 106, § 71, and the case was submitted to the jury on the first and second counts at common law for injuries caused to him by a vicious horse, or a defective harness, each furnished for his use while in the employment of the defendant.

Under either count he would be required to prove that the relation of master and servant existed between them, and for this purpose he introduced evidence, that the defendant, who was a baker, employed a large number of men, among whom was one Charles Campbell, an uncle of the plaintiff, who drove one of the bakery wagons, and was a witness at the trial. He testified that the defendant told him that in his absence he could ask the defendant's brothers for such further instructions in the conduct of the business as might be necessary. In consequence of this direction, Campbell asked the defendant's brother, Owen Coyle, about an assistant to aid him on the team in the delivery of goods, and to take the place of a boy who had previously acted in this capacity, but was absent at the time.

Before this, in a talk with the defendant himself, the witness had stated that he probably "could get the Palmer boy," and that the defendant said "all right," and in the talk with the defendant's brother, the witness said "probably I could get a boy," to which the reply was "all right." After these conversations, and finding it necessary to have an assistant, the witness then asked the plaintiff to accompany him as such, and told him that he would receive as wages "fifty cents a day and his meals." The plaintiff complied, and was injured on the first day of his employment while riding with his uncle, and assisting him in his work. From this evidence notwithstanding the defendant's denial, it could be found that the plaintiff was hired by Campbell, either with the knowledge and assent of the defendant, or of his brother, who had authority to act for him in his absence. *Thomas* v. *Wells*, 140 Mass. 517.

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By his contract of service the plaintiff assumed the risk of injury from the negligence of a fellow servant, and if Campbell was careless in selecting, or using, a defective harness, when he might have taken or used a sound one, and the plaintiff was thereby injured he cannot recover.

But the only evidence that at the time all the harnesses from which a choice could have been made were sound came from the defendant and his witnesses, whom the jury were not bound to believe. It appeared that the wagon would not have gone forward and let the whiffletree come into contact with the horse if the breeching strap had not broken at the buckle, and this taken in connection with the statement that the harness was an old one was some proof for the consideration of the jury that it was defective.

It must be presumed that the case was submitted to the jury under sufficient instructions, as no reference is made in the exceptions that they were not full and proper and a verdict on the second count, as matter of law, could not have been ordered for the defendant. *Devine* v. *Murphy*, 168 Mass. 249.

The first count does not charge the defendant with negligence in furnishing a vicious horse as an industrial appliance for the plaintiff's use. See *Green & Coates Street Passenger Railway* v. *Bremer*, 97 Penn. St. 103; *Gray* v. *Floersheim*, 164 Penn. St. 508.

But the right to recover under that count rests on the ground that the horse was "wild, vicious, unruly and accustomed to kick", and that the defendant knew, or in the exercise of reasonable care ought to have known of these habits. *Popplewell* v. *Pierce*, 10 Cush. 509, 511. It was thus incumbent on him to prove this allegation.

In this State it has been held that the reputation of human beings cannot be shown by proof of specific incidents of misconduct. *Miller* v. *Curtis*, 158 Mass. 127. *Connors* v. *Morton*, 160 Mass. 333, 335, and cases cited.

This rule, however, does not apply where the disposition of an animal is in issue. For this purpose single instances, of which there were several, when the horse exhibited many of the traits described, both before and after the accident, were admissible in proof of its general character. *Todd* v. *Rowley*,

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8 Allen, 51, 58. *Maggi* v. *Cutts*, 123 Mass. 535. *Broderick* v. *Higginson*, 169 Mass. 482.

How far a horse addicted to the habits of shying or running away would for this reason be more likely to act in a vicious manner when subjected to the experience of a wagon pressing against him, and a whiffletree dropping upon him while he was being driven, was a question of fact.

As a result of common observation it could not be said, that such a horse would be less susceptible to fright from this cause, or that his previous habits would not tend to produce a nervous condition that would indicate his probable action on this occasion, or that kicking might not be a part of his usual conduct previous to running away. His former vicious acts, which included kicking, might be considered as indicative of his disposition, and to furnish a forecast of what he would do when exposed to such an accident. *Lynch* v. *Richardson*, 163 Mass. 160. Compare *Eastman* v. *Scott*, 182 Mass. 192.

After evidence had been introduced tending to show an exhibition of the specific traits charged in the declaration, the sufficiency of which to support the issue was for the jury, further evidence of the reputation of the horse became admissible to prove the defendant's knowledge of his vicious qualities. *Monahan* v. *Worcester*, 150 Mass. 439. *Broderick* v. *Higginson*, *ubi supra*.

For a similar purpose it was competent to show that because of such propensities, the horse was driven with another horse when used by the defendant's servants as it was not thought safe to drive him alone, as well as the fact of the conversation in the defendant's presence when reference was made to him as the "runaway." *Sumner* v. *Gardiner*, 184 Mass. 433, 436.

The weight to be given to the evidence is not before us, and while a verdict for the defendant well might have been returned, we cannot say that there was any error of law in submitting the case to the jury on the various issues that have been discussed.

Exceptions overruled.

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WILLIAM W. CRAPO & another, trustees, *vs.* MARY L. PIERCE.

Bristol. October 24, 1904. — January 3, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Devise and Legacy, Construction.

A testatrix at the time of making her will had a man F. and his wife A. in her service who had been in her employ for many years, both before and after their marriage to each other. By her will she left a fund to trustees "to pay to F. who now works for me, the income and net profits arising therefrom during his life; and after the decease of said F. to pay the said income to his present wife, if she shall survive him, during her life, and after the decease of said F. and wife, to pay, distribute and divide the said principal fund, however the same may be then invested, to and among the children of said F. and wife and the issue of any deceased child by right of representation." F. had a child by a former marriage, who survived both F. and his second wife A. There also were children by the second marriage who were living when the will was made and who survived their parents. *Held*, that the expression "the children of said F. and wife" as used in this clause meant only the children of their marriage, and did not mean the children of each of them, so that the child of F. by the former marriage was excluded from the distribution.

PETITION, filed February 3, 1903, in the Probate Court for the county of Bristol by the trustees under the will of Sylvia Ann Howland, late of New Bedford, for an order of distribution of a fund held under that will for the benefit of Frederick Brownell during his life and after his death for the benefit of his widow, Anna B. Brownell, who now had deceased.

On appeal the case was heard by *Loring*, J. upon an agreed statement of facts. He found the facts to be as stated in the agreed facts, and made a decree affirming the decree of the Probate Court, that the property be distributed between Frederick A. Brownell and Abby R. Brownell, the children of Frederick Brownell by his wife Anna B. Brownell, excluding Mary Louise Pierce, the child of Frederick Brownell by a former marriage, and remanding the case to the Probate Court for further proceedings. Mary Louise Pierce appealed.

The agreed facts were as follows: Frederick Brownell, named in the fifth clause of the will of Sylvia Ann Howland, was born

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in 1826. In 1844 he entered the employ of Edward M. Robinson and his wife who was the sister of Sylvia Ann Howland. He continued in their employ until 1853, and from that time was a member of the household of Sylvia Ann Howland until her death in 1865. Frederick Brownell married Eliza Jane Slocum in 1845, and to them in 1850 was born Mary Louise Brownell, now Mary Louise Pierce, one of the respondents. Eliza Jane Brownell died on March 27, 1852, and Mary Louise Pierce was placed in the care of her grandmother, Frederick Brownell's mother. Mary Louise Pierce was known to Sylvia Ann Howland, and was frequently about her house before 1863.

Frederick Brownell was greatly esteemed by Sylvia Ann Howland and she frequently spoke in high terms of him, and said that he had done well by her. On October 16, 1856, Frederick married Anna B. Remington, who was at that time in the employ of Sylvia Ann Howland, and to them were born Frederick A. Brownell in 1857, and Abby R. Brownell in 1861, two of the respondents, and no other children. Both of these children were known to Sylvia Ann Howland before the execution of her will. In 1864 Sylvia Ann Howland conveyed to Anna B. Brownell the house in which she and Frederick lived. On September 1, 1863, the date of the execution of the will, Frederick Brownell and Anna B. Brownell were living together as husband and wife and so had been living continuously since their marriage.

The material portion of the will is quoted in the opinion.

O. Prescott, Jr., for the trustees, stated the case.

W. B. Perry, (*J. T. Keen & L. W. Jenney* with him,) for Mary Louise Pierce.

J. E. N. Shaw, for Frederick A. Brownell and Abby R. Brownell.

BRALEY, J. By the fifth clause of her will Sylvia Ann Howland gave $10,000 to trustees, whose successors are the petitioners, upon the trust "to pay to Frederick Brownell who now works for me, the income and net profits arising therefrom during his life; and after the decease of said Frederick to pay the said income to his present wife, if she shall survive him, during her life, and after the decease of said Frederick and wife, to pay, distribute and divide the said principal fund, however the

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same may be then invested, to and among the children of said Frederick and wife and the issue of any deceased child by right of representation."

As the beneficiaries for life are dead, the principal fund is now to be distributed. The question is whether Mary L. Pierce, the appellant, a child of Frederick Brownell by his first marriage, is entitled to share in the distribution with Frederick A. Brownell and Abby R. Brownell, children by his second marriage.

It is well settled law that in the construction of a will not only the intention of the testator must control, but is to be gathered from the instrument itself read in the light of the circumstances existing at the time it was made. *Dana* v. *Dana*, 185 Mass. 156. *Thissell* v. *Schillinger*, 186 Mass. 180. *Denfield, petitioner*, 156 Mass. 265.

These familiar rules are to be applied for the purpose of ascertaining the intention of the testatrix.

At the date of the execution of the will Frederick Brownell and his wife Anna B. Brownell were in the employment of the testatrix. They had been for many years in her service both before and after their marriage, and the existing relation created not only a friendly interest in their welfare, but led her to recognize their long and faithful service by making pecuniary provision for their benefit.

With these conditions in mind she provides for Frederick absolutely during his life, and at his death the income is given to "his present wife."

This specific provision while designed to show her regard for Anna also prevented the possible intervention of another legatee for life before distribution among the children, if Anna died and Frederick again married. Even if all his children were living, yet in her contemplation the family was a unit composed of Frederick, his wife, and the two children born of the second marriage; for she immediately goes on to provide for a final distribution after the decease of their father and mother.

If she had said the children of "said Frederick", and gone no further, those born of both marriages would have been included. *Andrews* v. *Andrews*, L. R. 15 Ir. 199.

But the qualifying words "and wife" are used, and constitute a limitation which cannot be rejected, and narrows the gift.

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The whole phrase then should be read collectively as she used it, and not distributively to mean the children of Frederick, and the children of Anna. *Luce* v. *Harris*, 79 Penn. St. 432. *Gelston* v. *Shields*, 78 N. Y. 275.

By this interpretation the words plainly identify "children" to be the issue of Frederick by "his present wife", and do not include the appellant.

Decree of Probate Court affirmed.

JULIUS GARST *vs.* CLARENCE A. CHARLES.

Worcester. November 14, 1904. — January 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Conspiracy, Civil. *Equity Jurisdiction.*

A conspiracy to deprive one of the benefit of a contract with another is unlawful.

The owner and manufacturer of a proprietary medicine, who sells it only to retail dealers under contracts binding them not to sell it at less than a specified price, may maintain a suit in equity against a retail druggist, who conspires with another person to have the other person buy the medicine from the plaintiff for the purpose of breaking the contract which he signs, by selling the medicine at the wholesale price to the defendant to be sold by him at retail at a price less than that specified in the contract, and who sells the medicine in accordance with this plan. In such a suit the plaintiff is entitled to an injunction, and to damages for the injury already suffered.

BILL IN EQUITY, filed June 16, 1903, by the owner and manufacturer of a proprietary medicine known as phenyo caffein, made from a secret formula originated and owned by the plaintiff, the trade mark of the medicine being registered in the United States patent office and in the office of the secretary of the Commonwealth of Massachusetts, to restrain the defendant, a retail druggist, from selling the medicine for less than twenty-five cents a box or advertising it for sale at less than that price, and from inducing and procuring one Bickford or any other person to buy the medicine from the plaintiff and sell it to the defendant in violation of the contracts made by such

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purchasers with the plaintiff, and for damages suffered from such wrongful acts of the defendant already committed.

The defendant demurred. In the Superior Court the case was heard upon the bill and demurrer by *Maynard*, J., who overruled the demurrer, and made the following decree:

"This cause came on to be heard upon the defendant's demurrer and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the defendant's demurrer to the plaintiff's bill of complaint be overruled and thereupon, the defendant having elected to stand by his demurrer and waiving his right to answer to the said bill of complaint, the court found the material allegations in said bill of complaint to be true and that the equity of said cause was with the complainant:

"And it is further ordered, adjudged and decreed that the defendant, his servants or agents, be and each and all of them are hereby restrained and perpetually enjoined from selling or offering to sell, for less than twenty-five (25) cents per box, phenyo caffein purchased by the defendant of, or delivered to the defendant by, persons who have been procured by the defendant to purchase and who have purchased of the plaintiff directly, or through the plaintiff's agent, Carter, Carter & Meigs, or through any other agents of the plaintiff who have entered into the agreement annexed to the plaintiff's bill of complaint, such phenyo caffein under an agreement to abide by the terms of said agreement and of the notice, a copy of which is annexed to the plaintiff's bill of complaint, and which the defendant has purchased or procured of such agents either with or without agreeing to abide by the terms of said contract and notice:

"And it is further ordered, adjudged and decreed that the defendant, his servants and agents, be and each and all of them are hereby restrained and perpetually enjoined from, directly or indirectly, inducing any person or persons to procure of the plaintiff, his agents or servants, any of said phenyo caffein under an agreement to abide by the terms contained in said agreement and notices with the intent on the part of the person so procuring said phenyo caffein to sell or deliver the same to the defendant without the defendant's agreeing to the terms of said agreement and notices:

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"And it is further ordered, adjudged and decreed that the defendant, his servants and agents, be and each and all of them are hereby restrained and perpetually enjoined from inducing and procuring Frank B. Bickford, mentioned in the plaintiff's bill, or any other person to violate any of the terms or conditions in said contracts for the sale of phenyo caffein made between said Bickford or any other person and the plaintiff or his agents:

"And it is further ordered, adjudged and decreed that the plaintiff has been damaged in consequence of the acts and conduct of the defendant complained of in the plaintiff's bill to the extent of one hundred and one (101) dollars, and it is decreed that the defendant pay the plaintiff said sum of one hundred and one dollars together with the cost of these proceedings and that execution may issue therefor."

The defendant appealed.

The contract in question in this case differed somewhat in form from that printed in *Garst* v. *Harris*, 177 Mass. 72, and sought to be enforced in that case and in *Garst* v. *Hall & Lyon Co.* 179 Mass. 588.

The contract in the present case was as follows:

"Notice.

"All persons handling Phenyo-Caffein are hereby notified that all Phenyo-Caffein remains the property of the Phenyo-Caffein Company subject to the conditions named in the following contract, said conditions to remain in force until revoked by us.

"Phenyo-Caffein Co.,
"Julius Garst, Proprietor.

"Contract.

"Between the Phenyo-Caffein Company, hereinafter called the Company, and the retail acceptor of goods made by it, hereinafter called the Acceptor.

"In consideration of an exchange of values the company and the acceptor agree as follows:

"a — The company agrees.

"1. To deliver possession of goods of its make to the acceptor on the terms and conditions that he will not sell the 25 cent size, for less than 25 cents a box, nor the 10 cent size for less than 10 cents.

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"2. To take back from the acceptor, upon written request, possession of any of the said goods at the net price at which they were delivered to the acceptor.

"b — The acceptor agrees.

"1. Not to sell the 25 cent size, for less than 25 cents a box, nor the 10 cent size for less than 10 cents.

"2. That in case the fact should be established that the contract has been violated by him, he agrees to pay to the company, twenty-one dollars, that sum being the agreed amount that the company would be damaged by a breach of this agreement. This clause, as to the amount of damages, is inserted because it is recognized and agreed that a breach of this agreement would cause the company to suffer a material loss, and also that it would be difficult, and usually impossible to prove the exact amount of such loss.

"3. That the acceptance of possession of any of said goods at any time or times shall be an assent on his part to the foregoing terms and conditions.

"Price and discount to the retail trade.

"$1.20 per dozen, 10 cent size, less 41⅔ per cent. discount, i. e., 75 c.

"$3.00 per dozen, 25 cent size, less 41⅔ per cent. discount, i. e., $1.75 per dozen.

"½ gross lots, either size or assorted, 41⅔ per cent. and 5 per cent. discount, i. e., $9.97 (25 c. size).

"1 gross lots, either size or assorted, 41⅔ per cent. and 10 per cent. discount, i. e., $18.90 (25 c. size). 1 per cent. cash, ten days."

Upon every box of the twenty-five cent size was the following notice:

"Important Notice.

"The Phenyo-Caffein Co. retains the ownership of this box and of the pills contained therein, and authorizes their sale under the name Phenyo-Caffein by anyone in possession only, at the face price, 25 c. Whoever sells said goods (unless he has acquired title thereto by paying face price for the same) does so as agent for the Phenyo-Caffein Co., and has no authority to vary from the terms of this notice. Whoever obtains said

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goods for a less price from such agent acquires only wrongful possession and cannot rightfully sell nor consume the same. Any agent that sells said goods at less than face price agrees to pay to the Phenyo-Caffein Co. $21 as liquidated damages for the injury done, such injury being incapable of exact measurement."

Upon every carton or package of twelve boxes of the twenty-five cent size was the following notice:

"Notice to Retailers of Phenyo-Caffein.

"In consideration of the delivery of the possession of this dozen boxes of phenyo-caffein, or any part thereof from the Phenyo-Caffein Company, directly or through the agency of a distributor or otherwise, the retail distributor agrees that he will act as agent of said company in selling said goods, and will not sell phenyo-caffein, 25 c. size, for less than 25 c. per box. The retail distributor further agrees that the acceptance of said goods shall be held to be an assent on his part to the foregoing terms, and in case he violates the same, said distributor agrees to pay to the Phenyo-Caffein Company the sum of $21 as liquidated damages for the injury done, such injury being incapable of exact measurement.

"Should the retail distributor desire to discontinue dealing in phenyo-caffein and notify the company of that fact in writing, said company agrees to take back any of the said phenyo-caffein at the net cost at which it was delivered to the distributor, provided the goods are in good condition.

"Phenyo-Caffein Co.,

"Worcester, Mass."

E. H. Vaughan, for the defendant.

W. Thayer, H. W. Cobb & F. A. Walker, for the plaintiff.

KNOWLTON, C. J. The plaintiff, being the owner and manufacturer of a proprietary medicine known as phenyo caffein, sold it only to retail dealers under contracts in which they agreed not to sell it at less than a specified price, and he undertook to stipulate that purchasers from his purchasers should obtain and sell it only under such an agreement. His right to secure such advantages to himself, so far as possible by contracts in proper form, is not now questioned. See *Garst* v. *Harris*, 177 Mass. 72; *Park & Sons Co.* v. *National Wholesale Druggists' Association*, 54 App. Div. (N. Y.) 223.

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The defendant is a retail druggist who knew that all phenyo caffein was sold by the plaintiff under the contracts referred to, and with notices affixed to the small boxes and to the larger packages showing the understanding of the plaintiff and of the purchasers as to the price at which it might be sold. After buying a quantity of medicine from the plaintiff, he returned it, in accordance with the terms of his contract under which he had a right to return it if he wished to discontinue the business of selling it, and he notified the plaintiff's agents that he should not keep the medicine. He then procured one Bickford, who was a retail druggist, to buy a large quantity of the medicine from the plaintiff's agents, and Bickford entered into a contract such as has been referred to, and agreed that he would fulfil all the terms of the contracts and notices affixed to the boxes and packages, one of which was that he would act as the agent of the plaintiff and would not sell the medicine at less than the specified price. He purchased the goods at a much less price, which was the discount rate made by the manufacturer to the retail trade, as stated in the contract. He then turned it over to the defendant at the purchase price, and the defendant has been selling it and advertising it for sale at retail at less than the specified price. All this was in pursuance of a conspiracy between the defendant and Bickford that Bickford should make this contract and should break it, to the injury of the plaintiff for the benefit of the defendant.

A conspiracy to deprive one of the benefit of a contract with another is unlawful. *Carew* v. *Rutherford*, 106 Mass. 1. *Walker* v. *Cronin*, 107 Mass. 555. *Vegelahn* v. *Guntner*, 167 Mass. 92. *Plant* v. *Woods*, 176 Mass. 492. The defendant's arrangement with Bickford that he should break the contract was a wrong upon the plaintiff, intended for the defendant's advantage. The scheme was fraudulent. The purpose of the defendant was to induce the plaintiff to part with his property at a comparatively low price to a person who was in fact a retail druggist, and who represented by his words and conduct that he wanted the medicine to sell at retail, and who agreed not to sell it at less than the regular retail price, when in fact he was obtaining it under an arrangement to turn it over to the defendant at the wholesale price, to be sold by him at retail at less than the

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regular price. The defendant was a party to this scheme of fraud, and presumably was the author of it. He should be held liable for the wrong. *Exchange Telegraph Co.* v. *Central News*, [1897] 2 Ch. 48. *Dodge Co.* v. *Construction Information Co.* 183 Mass. 62. In this respect the case is very different from *Garst* v. *Hall & Lyon Co.* 179 Mass. 588. See also *Taddy* v. *Sterious*, [1904] 1 Ch. 354.

The suit is one which calls for relief in equity. The damages are of a kind that cannot be accurately computed or easily estimated. The remedy at law is not complete and adequate, and an injunction with damages for the injury already suffered gives the only proper relief.

Decree affirmed.

CITY OF HAVERHILL *vs.* CITY OF MARLBOROUGH.

Essex. November 3, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Exceptions, Agreed statement of facts. *Municipal Corporations. Pauper. Public Health. Statute*, Construction, Repeal, effect of. *Board of Health.*

A party aggrieved by a ruling of law, made by a judge upon an agreed statement of facts which gives no power to draw inferences of fact, has the right to allege exceptions, under R. L. c. 173, § 106, but where such exceptions can present no questions which are not open on an appeal from a judgment on the agreed facts, the resort to exceptions is bad practice because wholly useless.

An erroneous ruling upon a question of law, made by a judge hearing a case upon an agreed statement of facts which gives no power to draw inferences of fact, if it is not material to the decision of the judge furnishes no ground for a reversal of the judgment.

The provision of R. L. c. 75, § 40, that "each city shall establish and be constantly provided, within its limits, with one or more isolation hospitals for the reception of persons having smallpox or any other disease dangerous to the public health," does not require that all persons ill with smallpox shall be treated in such hospitals and not elsewhere, and under the provisions of § 42 of the same chapter it is within the power of the proper officers of a city either to remove to a hospital the persons who have fallen ill of smallpox or to care for them in the houses where they reside, and no person can be removed to a hospital against his will unless in the opinion of the city's board of health and of the attending physician the case cannot be isolated properly in the house where the patient resides. For these reasons the failure of a city to provide itself with a smallpox

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hospital does not prevent it from recovering in an action against another city under R. L. c. 75, § 57, for expenses incurred by its board of health for persons infected with smallpox having a settlement in the defendant city.

In an action by one city against another, under R. L. c. 75, § 57, for expenses incurred by the plaintiff's board of health for persons infected with smallpox having a legal settlement in the defendant, if it appears that the persons in question were the only ones who fell ill in the house in which they were cared for, the plaintiff can recover the amount of a physician's reasonable bill, charging not only for his services required at the house but also for two weeks' quarantine thereafter, for which the plaintiff in its contract with the physician had agreed to pay.

In an action by one city against another, under R. L. c. 75, § 57, for expenses incurred by the plaintiff's board of health for persons infected with smallpox having a legal settlement in the defendant, the plaintiff cannot recover expenses incurred for the services of policemen stationed to enforce the quarantine of the house in which the patients were isolated, or for supplies for other persons not ill who were quarantined in the same house, these expenses having been incurred not for the persons infected with smallpox but for the preservation of the public health.

A statute is not to be construed as retroactive unless an intention that it should affect past transactions is expressed in its provisions.

St. 1902, c. 213, relating to the compensation of a city or town for expenses incurred for persons infected with smallpox having settlements in another city or town, which repealed R. L. c. 75, § 57, relating to the same subject, did not destroy or affect obligations existing under the repealed section.

Whether under St. 1902, c. 213, § 1, a city or town, whose board of health has incurred expenses for persons infected with smallpox having settlements in another city or town can maintain an action for such expenses without first obtaining the approval of its bill by the board of health of the defendant city or town, *quære*.

CONTRACT, under R. L. c. 75, §§ 54, 57, for expenses incurred by the board of health of the city of Haverhill in making the provision required by law for Geneva Wright and Charles Wright, persons infected with the smallpox, having a legal settlement in the city of Marlborough. Writ dated July 28, 1902.

In the Superior Court the case was heard by *Holmes*, J., without a jury, upon an agreed statement of facts. The judge ruled that the reasonable expenses incurred for Geneva and Charles Wright must be limited to items one to six inclusive of the plaintiff's declaration, and that $200 paid the physician under his contract for the two weeks subsequent to his attending the Wrights was a part of his compensation for attending them and should be allowed. He found that items one to six inclusive of the declaration were reasonable expenses incurred for the Wrights in their care and treatment for smallpox, and allowed these items.

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All the other items of the declaration the judge disallowed as matter of law as not incurred for the Wrights. The judge ruled that upon the facts stated the removal of the Wrights from their residence was not required, and that they properly might be cared for by the board of health at their residence. The judge also ruled that if St. 1902, c. 213, requires approval by the board of health of a defendant municipality of a bill for caring for a poor person affected with an infectious disease as a prerequisite to recovery, still that act is to be construed as operating prospectively and not to affect cases where relief proceedings were undertaken before it went into effect. The judge also ruled that the failure of the plaintiff to establish an isolation hospital could not avail the defendant to defeat this action.

The judge allowed interest only from the date of the writ, and found for the plaintiff in the sum of $1,018.64, and apparently gave judgment for that sum. Both the plaintiff and the defendant appealed. The defendant also, without waiving its appeal, alleged exceptions, which were allowed by the judge as follows: "I think that all the questions of law arising in this case can be heard upon the appeal, but if as a matter of law I can allow these exceptions then they are allowed."

J. W. McDonald, for the defendant.

E. S. Abbott, for the plaintiff.

BARKER, J. The expenses for which repayment is sought were incurred by the city of Haverhill in consequence of the falling ill with smallpox within its limits of two persons whose settlement was in Marlborough. The expenses were incurred between February 27, 1902, and the fifth day of the following April. In the lower court the case was tried without a jury upon the pleadings and an agreed statement of facts, and a finding was made for the plaintiff in respect of a part only of the items declared for. Both parties appealed to this court, and the defendant also filed a bill of exceptions. The agreed statement of facts gave the court no power to draw inferences of fact. For this reason the plaintiff contends that the defendant had no right of exception. But rulings of law made upon the trial of a case upon an agreed statement of facts are rulings by which either party to the case may be aggrieved, and the right to allege and prosecute such exceptions is conferred by statute. R. L. c. 173, §§ 105–110.

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But in cases like the present it is wholly useless and therefore bad practice to prosecute exceptions, for the reason that no relief can be given to the excepting party upon his bill of exceptions which would not be open to him upon an appeal merely. Neither the court of first instance nor this court can draw inferences of fact when the agreed statement has no clause giving that power. The final decision in such a case is that required as a matter of law by the application of correct principles of law to the facts agreed. All questions of law material to the decision therefore are open upon the appeal; and if the court below has made an erroneous ruling upon a question of law not material to the decision, the error furnishes no ground for a reversal of the judgment, and it is useless to ask us to revise it upon exceptions. See *Rand* v. *Hanson*, 154 Mass. 87, 91; *Norton* v. *Brookline*, 181 Mass. 360, 364.

When the expenditures of the plaintiff began on February 27, 1902, its power and duty to incur them and its right to recover on account of them were regulated by the provisions concerning hospitals and dangerous diseases contained in R. L. c. 75, §§ 35–58, the duty of repayment being imposed by § 57, and the right of action being conferred upon the municipality by § 54. Before the expenditures had been completed on April 5, 1902, the Legislature had enacted the St. 1902, c. 213, which took effect on March 26, 1902.

The defendant contends that the plaintiff can take nothing by its action because it had not established an isolation hospital in accordance with the provisions of R. L. c. 75, § 40, and also because the persons ill with smallpox were not removed to a hospital but were kept in the dwelling where they fell ill. We think these contentions unsound. In the first place, § 40, which provides that "each city shall establish and be constantly provided, within its limits, with one or more isolation hospitals for the reception of persons having smallpox or any other disease dangerous to the public health," provides its own penalty, which is a forfeiture of not more than $500 for each refusal or neglect to comply with the provisions of the section upon request of the State board of health, and does not enact that all persons ill with smallpox, or any such persons, shall be treated in such hospitals and not elsewhere. In the next place, under the provi-

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sions of § 42, which under R. L. c. 8, § 5, cl. 23, we construe to apply to cities, it was within the power of the proper officers of the plaintiff either to remove to a hospital the persons who had fallen ill or to care for them in the house where they resided; nor could the persons lawfully be removed to any hospital unless in the opinion of the plaintiff's board of health and of the attending physician the case could not be isolated properly in the house where the patients resided. R. L. c. 75, § 56.

The expenses for which the plaintiff seeks to recover are of several classes, one only of which was allowed for in the finding for the plaintiff in the court below. The expenses so allowed were for the services of a physician, medicines, household supplies and rent of the house. The only question raised by the defendant as to the expenses of this class, if the plaintiff is held to be entitled to recover at all, is as to the services of the physician. He was employed on February 27, 1902, to go to the house and remain there to attend and care for all persons in the building who then were or might be ill of smallpox, and he remained at the house under that employment until April 5, 1902. No persons in the house fell ill with smallpox except the two who had settlements in Marlborough. His agreed compensation for the service was to be a certain sum per week for such time as his services should be required at the house and for two weeks' quarantine thereafter; and the charge for his services in the plaintiff's bill of particulars includes the agreed compensation for the two weeks after he left the house. It is agreed that the prices charged in the bill are reasonable for the services rendered, and from this it follows as a conclusion of law that the amount paid the physician was a reasonable one. But the defendant contends that the stipend for the two weeks after the physician had been allowed to leave the house and during which he rendered no services to the persons who had been ill there were not expenses incurred in making any provision for the persons infected with smallpox, but were merely expenses incurred for the protection of the public from contagion. We think this too fine a distinction to be followed, and that the whole sum paid to the physician was an expense incurred in providing medical attendance for the two persons who were ill.

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The other classes of expenses were for services of policemen stationed to enforce the quarantine of the house, and for supplies for other persons not ill, furnished because they also were quarantined in the same building. All these expenses were disallowed by the lower court, and we think rightly. They were not incurred for the persons infected with smallpox, but for the preservation of the public health.

The remaining contention of the defendant is that the plaintiff can recover nothing because the bill of the plaintiff's expenses has not been approved by the board of health of the city of Marlborough, as provided for by St. 1902, c. 213, § 1. The court below ruled that if St. 1902, c. 213, requires the approval of the board of health of the defendant to the plaintiff's bill as a prerequisite to recovery still that statute is to be construed to act prospectively and not to affect cases where relief proceedings were undertaken before it went into effect. The presumption that the operation of a statute is to be prospective, and not to affect transactions already passed, is always to be made unless the contrary appears. *North Bridgewater Bank* v. *Copeland*, 7 Allen, 139, 140, and cases cited. *Commonwealth* v. *Sudbury*, 106 Mass. 268. *Murray* v. *Gibson*, 15 How. 421.

The only circumstance which can be urged in support of the theory that the Legislature intended that the new provisions of St. 1902, c. 213, § 1, should apply to instances in which the duty to make provision for persons ill with a disease dangerous to the public health had already arisen and either had been met or already was in course of performance is the express repeal, without a saving clause, of R. L. c. 75, § 57, by St. 1902, c. 213, § 3. But it is to be noted that § 57 did not in terms confer the right of action. As the statutory scheme stood up to March 26, 1902, the office of § 57 was to impose the duty of reimbursement upon the person infected, his parent or master, the town of his settlement or the Commonwealth, and if by the latter to direct how the bills should be approved, and impliedly to authorize the making of payments in such cases by municipalities or by the Commonwealth. If payment was not made in accordance with the duty, the right of action was given by R. L. c. 75, § 54, and this section was not repealed or changed by St. 1902, c. 213. Looking at the provisions of that

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statute, we find that its first section imposes the obligation to make repayment in the same language except that the master of the infected person is not mentioned, and that all the new provisions of the section are concerned with notices to be given of the state of things requiring the expenses to be incurred, the approval by certain boards of the bills, and the determination of settlements, and that the statute nowhere says in terms that its provisions are intended to affect past transactions. We think its fair construction is as if it had said that as to cases of infection arising after March 26, 1902, the master of the infected person shall not be bound to make payment, and in the same class of cases, the notices to be given, the determination of the settlement, and the approval of the bills shall be regulated as provided in the new statute. We cannot think that it was the intention of the Legislature that the provisions of its first section, so far as they were inconsistent with or in addition to those of R. L. c. 75, § 57, should apply, except in instances where the action of the municipality to which the payment is to be made was wholly subsequent to the time when the statute took effect. When the repeal was made the obligation of the defendant was already in existence. Reading the new statute in connection with the many provisions upon the same general subject contained in R. L. c. 75, §§ 35–58, and in St. 1902, c. 206, approved on March 19, 1902, to take effect in the following month, it is impossible to think that the Legislature intended by the repeal to destroy existing obligations.

Some of the provisions of St. 1902, c. 213, § 1, are novel and the whole section is not easy of construction. It is not necessary in the present case to decide whether the approval of the bill by the board of health is a prerequisite to an action to recover and we express no opinion on that point.

Defendant's exceptions overruled; judgment for the plaintiff affirmed.

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MORRIS M. GREENSTEIN *vs.* WILLIAM M. CHICK.

Essex. November 3, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Exceptions. *Employers' Liability Act. Negligence*, Employer's liability.

On the argument of an exception to a refusal to rule that the plaintiff is not entitled to recover in an action under the employers' liability act, the defendant cannot raise the point that the count on which the case was tried set forth no cause of action under the act, if this point was not raised in the court below either by demurrer or by asking for a ruling on the pleadings, and the case was tried on the assumption that the count properly alleged the negligence of a superintendent of the defendant within the terms of the act.

Under the employers' liability act the signature to a notice of the time, place and cause of an injury is sufficient if signed with the name of the plaintiff's attorney by the attorney's stenographer to whom he dictated it.

If a superintendent in a factory says that he will go to the engine room and have the power shut off to stop the machinery so that a belt may be unwound from a shaft around which it has been drawn after coming off a pulley, and tells a workman to go upon a platform after the machine has stopped and unwind the belt, and if a few minutes later the machine stops and the workman goes upon the platform and begins to unwind the belt, when the machine almost instantly starts and catches the workman's arm, causing personal injury, this is evidence of negligence on the part of the superintendent for which the proprietor of the factory can be held liable to the workman. When a superintendent puts a workman in such a dangerous place it is his duty to look out for him and see that the machinery does not start.

TORT for personal injuries received on May 22, 1901, while the plaintiff was employed in the defendant's factory at Haverhill, alleged to have been caused by the negligence of one Pratt, the defendant's foreman in charge of the work at the factory. Writ dated August 24, 1901.

In the Superior Court the case was tried before *De Courcy*, J., who refused the defendant's requests for rulings which are quoted in the third paragraph of the opinion, and submitted the case to the jury with a special question the answer to which is stated in the same paragraph of the opinion. The jury returned a verdict for the plaintiff in the sum of $4,000; and the defendant alleged exceptions.

W. S. Knox & J. H. Pearl, for the defendant.

J. J. Mahoney, for the plaintiff.

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LATHROP, J. 1. The defendant first contends that the plaintiff was not entitled to recover on the third count, on which the case went to the jury, on the ground that the count does not set forth a cause of action under the St. of 1887, c. 270, § 1, cl. 2, in that it does not set forth that the injury was caused "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." But the answer to this is that no such question was raised in the court below, either by demurrer, or by asking for a ruling upon the pleadings. We have no desire to encourage slovenly pleadings, but it is evident that this case was tried in the court below on the assumption that the third count was a good count under the statute, as the exceptions state that it was admitted that Pratt, the foreman, who was charged in the count with negligence, was a superintendent within the employers' liability act.

2. The next question is as to the notice. No objection is made to the form of it, but only to the signature, which is "David Benshimol, per H. B." Mr. Benshimol testified that he was retained to give the notice; that he dictated the notice to his stenographer, Helen Blair, and that his name was written by her by his authority. We have no doubt that the notice was sufficient. *Dolan* v. *Alley*, 153 Mass. 380, 382.

3. The remaining question arises upon the exception of the defendant to the refusal of the presiding judge to give the following rulings: "1. Upon all the evidence the plaintiff is not entitled to recover. 2. There is not sufficient evidence to authorize the jury to return a verdict for the plaintiff." The evidence in the case was very contradictory; and it was impossible for the judge to give the rulings requested, unless the plaintiff failed to make out a case entitling him to recover. It is clear from the evidence given by the plaintiff and his fellow workman who testified in his behalf that the jury were warranted in finding that the belt, which operated the machine at which the plaintiff was working, came off the lower pulley and began to wind around the shafting above; that the plaintiff spoke to Pratt, the superintendent, about it; that Pratt, after examining the machine, said he would go to the engine room and have the power shut off; that the plaintiff was directed by Pratt,

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when the machine stopped, to go up on a platform and unwind the belt; that within a few minutes the machine stopped; that the plaintiff went upon the platform as directed and began to unwind the belt, when the machine almost instantly started, the plaintiff's arm was caught, and he sustained the injury complained of. The case is not one of the giving of an order by the superintendent which was disobeyed by the engineer, a fellow servant of the plaintiff, for Pratt denied giving the order and the engineer denied receiving any order from him, and testified that the engine was not stopped until after the accident. The jury found specially that the machinery was not in motion when the plaintiff took hold of the belt. The accident was of a kind easily preventable by the exercise of due care and superintendence on the part of Pratt. He had put the plaintiff in a dangerous place to work if the machinery started, and it was his duty to look after him and see that the machinery did not start. See *Scullane* v. *Kellogg*, 169 Mass. 544, 549; *Malcolm* v. *Fuller*, 152 Mass. 160; *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532; *O'Brien* v. *West End Street Railway*, 173 Mass. 105.

Exceptions overruled.

MASSACHUSETTS NATIONAL BANK *vs.* CHARLES H. SNOW.

Suffolk. November 9, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Bills and Notes. Negotiable Instruments Act. Alteration of Instruments. Pleading, Civil.

Under R. L. c. 73, § 26, cl. 5, a promissory note indorsed in blank by the payee is payable to bearer.

Under R. L. c. 73, § 207, if the maker of a promissory note wrongfully obtains possession of it after it has been indorsed in blank by the payee, he is the bearer within the meaning of the statute.

If the maker of a promissory note wrongfully obtains possession of it after it has been indorsed in blank by the payee, and presents it at a bank for discount, the fact that the bearer is the maker does not put the bank upon inquiry or prevent it from becoming a holder in due course within the meaning of R. L. c. 73, § 74, if it discounts the note in good faith without actual knowledge of any infirmity. See § 73 of the same chapter.

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Under the negotiable instruments act, now R. L. c. 73, §§ 18–212, a holder in due course of a promissory note payable to bearer can acquire a good title to the note from one who has stolen it. And *semble*, that this was so in this Commonwealth before the statute.

The provision of R. L. c. 73, § 33, that "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto," does not render incomplete a promissory note indorsed in blank by the payee and afterwards stolen from him by the maker and presented by the thief to a bank that discounts it in good faith, because such a note takes effect when delivered by the maker to the payee and is made payable to bearer by the payee's indorsement in blank before the theft.

Under R. L. c. 73, § 141, when a negotiable instrument "has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." Whether such a holder of a note originally stated to be payable "with interest", no rate being named, and altered by the insertion of the words "seven per cent", must declare on the note as it was before the alteration in order to recover interest upon it at six per cent, *quære*.

CONTRACT on three promissory notes, each for $2,432.33, dated December 9, 1899, payable to and indorsed by the defendant and discounted by the plaintiff, as described in the first paragraph of the opinion. Writ dated April 25, 1900.

At the trial in the Superior Court before *Harris*, J. the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, raising the questions stated by the court.

E. P. Carver & F. H. Smith, Jr., for the plaintiff.

S. L. Whipple & E. M. Brooks, for the defendant.

KNOWLTON, C. J. This is an action of contract on three promissory notes, signed H. G. and H. W. Stevens, payable to the order of the defendant, indorsed by him in blank and discounted by the plaintiff. They severally bear date December 9, 1899, and the rights of the parties are accordingly governed by the St. 1898, c. 533, sometimes called the negotiable instruments act, which is now embodied in R. L. c. 73, §§ 18 to 212, inclusive. In referring to different provisions of this statute it may be convenient to cite the sections of the Revised Laws, rather than those of the original act.

The maker of the notes, H. W. Stevens, who did business under the name of H. G. and H. W. Stevens, has deceased, and the defendant introduced evidence tending to show that, after the defendant had indorsed the notes, they were taken from his possession by the maker, without his knowledge or consent, and discounted at the plaintiff bank, and that they were altered by

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the insertion of the words "seven per cent" after the words "with interest." The defence is founded on this evidence. The defendant's counsel stated that he made no contention that the bank had actual knowledge of any infirmity in the instruments, or defect in the title to them, or that it took them in bad faith. Nor was it contended by the defendant that in discounting the notes the bank acted otherwise than in the regular and usual course of business. But upon the defendant's testimony it might be found that the notes were given to him by the maker in payment of indebtedness, that after he had indorsed them in blank and put them in his desk for collection or discount he was called out of his office, leaving the maker Stevens there, and that Stevens then took them without right, and three days later carried them to the plaintiff bank and caused them to be discounted for his own benefit. The plaintiff made many requests for rulings, which were refused subject to its exception, among which were the following:

"First. That on all the evidence judgment should be for the plaintiff for the full amount declared upon in its declaration, with interest at seven per cent from December 9, 1899."

"Fourth. That if the plaintiff shows it took the notes declared upon in its declaration as a holder in due course, judgment should be entered for the plaintiff for the full amount of said notes with interest at the rate stated in the same from December 9, 1899.

"Fifth. That when an instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

"Eighth. That the notes declared upon by the plaintiff in its declaration are complete and regular, and were taken before they were due, and for value.

"Ninth. That a holder of a note is deemed *prima facie* to be a holder in due course and that to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

"Fifteenth. That there is no evidence in the case to warrant

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a jury in finding that the plaintiff was possessed of facts which put it upon its guard as to the title of the person delivering the notes declared upon or which ought to have led the plaintiff to inquiry concerning the same."

"Nineteenth. That when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

"Twenty-third. That even if the jury should find that the words 'seven per cent' were added to the face of said notes after they were indorsed by the defendant, and without his authorization or ratification, yet, on all the evidence in the case, the verdict must be for the plaintiff for the full amount of said notes, with interest at six per cent from December 9, 1899."

The plaintiff also excepted to the following instructions, given at the request of the defendant:

"Fourth. If the jury find that the notes were taken from the defendant wrongfully and that the same were never delivered by the defendant to Stevens, the plaintiff gained no title to the notes by the negotiation of the same by Stevens, and the plaintiff cannot recover.

"Fifth. The burden is upon the plaintiff to show that the notes were delivered by the defendant to Stevens or some other person authorized to negotiate them at the plaintiff bank."

"Seventh. Or in the alternative, if the jury find that the notes in question were altered by the addition of the words 'seven per cent' thereto after the same were indorsed by the defendant, such an alteration is a material and wrongful one, destroying the validity of the notes, and upon the notes or any one of them thus altered the plaintiff cannot recover."

The notes, being indorsed in blank, were payable to bearer within the meaning of the statute. R. L. c. 73, § 26, cl. 5. When the notes were taken to the plaintiff for discount Stevens was the bearer. R. L. c. 73, § 207. The presentation of such notes for discount raised a presumption of fact that the bearer was the owner of them. *Pettee* v. *Prout*, 3 Gray, 502. Upon the undisputed evidence and upon the defendant's admission that the plaintiff took them in good faith and discounted them without knowledge of any infirmity in them or defect of title in

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Stevens, the plaintiff became a holder in due course, within the definition of the statute. R. L. c. 73, §§ 69, 76. *Boston Steel & Iron Co.* v. *Steuer*, 183 Mass. 140. There was not even anything to put the plaintiff upon inquiry, for the rate of interest was the same that Stevens had been paying on his loans from the bank for two years. The uncontradicted evidence, as well as the defendant's admission, makes it plain that the plaintiff had no notice of any infirmity in the instruments or defect in the title of Stevens, under the rule prescribed by the statute. R. L. c. 73, § 73. This rule, namely, that to constitute such notice the person to whom the note is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, is the same as prevailed in this Commonwealth before the enactment of the statute. *Smith* v. *Livingston*, 111 Mass. 342. *Lee* v. *Whitney*, 149 Mass. 447. *International Trust Co.* v. *Wilson*, 161 Mass. 80, 90.

The defendant's contention that after the notes had been delivered to the defendant and indorsed by him they were stolen by Stevens, brings us to the question whether, under the negotiable instruments act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. *Wheeler* v. *Guild*, 20 Pick. 545, 550, 553. *Worcester County Bank* v. *Dorchester & Milton Bank*, 10 Cush. 488. *Wyer* v. *Dorchester & Milton Bank*, 11 Cush. 51, 53. *Spooner* v. *Holmes*, 102 Mass. 503. *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, and cases cited. *Smith* v. *Union Bank of London*, 1 Q. B. D. 31. *Goodman* v. *Simonds*, 20 How. 343, 365. *Murray* v. *Lardner*, 2 Wall. 110. *Hotchkiss* v. *National Shoe & Leather Bank*, 21 Wall. 354. *Kinyon* v. *Wohlford*, 17 Minn. 239. *Clarke* v. *Johnson*, 54 Ill. 296. *Seybel* v. *National Currency Bank*, 54 N. Y. 288. *Evertson* v. *National Bank of Newport*, 66 N. Y. 14. *Kuhns* v. *Gettysburg National Bank*, 68 Penn. St. 445.

The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course. "But

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where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." R. L. c. 73, § 33. This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course this rule does not apply to an instrument which is incomplete. But in reference to a complete, negotiable promissory note payable to bearer, it is a wholesome and salutary provision. See *Greeser* v. *Sugarman*, 76 N. Y. Supp. 922. Upon the defendant's statement and the counsel's theory of the case, the rule is applicable. The note not only was complete in form and in execution, but, upon his testimony, it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by him. Therefore the first sentence of the R. L. c. 73, § 33, "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto," was inapplicable. The instrument had taken effect, and subsequently was negotiated by the bearer to the plaintiff as a holder in due course. That the bearer was also the maker was immaterial after the instrument had been so indorsed as to become payable to bearer.

Upon the plaintiff's theory of the facts, there was no theft, but an ordinary accommodation indorsement by the defendant for the benefit of the maker, and none of these questions arise.

We are of opinion that the judge erred in giving the fourth and fifth instructions requested by the defendant, and in refusing other instructions requested by the plaintiff, founded upon a different view of the statute.

There also was error in the instructions given as to the alleged alteration of the notes. By the R. L. c. 73, § 141, it is provided that "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This language is directly applicable to the present case. See *Scholfield* v. *Earl of Londesborough*, [1894] 2 Q. B. 660; [1895] 1 Q. B. 536; [1896] A. C. 514; *Schwartz* v. *Wilner*, 90 Md. 136, 143.

We understand that the instructions were given independently of any question of pleading, and we therefore do not deem it

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necessary to determine, at this stage of the case, whether the plaintiff should amend its declaration by inserting counts upon the notes as they were before the alleged alteration, if it wishes to recover upon them as notes bearing interest at only six per cent. See *Mutual Loan Association* v. *Lesser*, 78 N. Y. Supp. 629. Nor do we consider other questions which are not likely to arise upon a second trial.

Exceptions sustained.

ANTOINETTE L. JOSLIN *vs.* EMORY W. GODDARD & another.

Worcester. November 10, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Equity Pleading and Practice, Master's report. *Deed*, Delivery.

A finding of fact by a master in a suit in equity, confirmed by an order of the court to which his report was made, will not be reversed unless the reported evidence clearly shows it to be wrong. In this case two deeds made by an aged woman and placed by her direction in the hands of one of her sons who was her confidential man of business, and who also was one of the grantees, were found by the master, on the facts as reported by him, to be void for want of delivery, and this finding, confirmed by the Superior Court, was not disturbed by this court.

BILL IN EQUITY, filed February 3, 1902, by a daughter of Mary A. Goddard, late of Webster, against two brothers of the plaintiff, sons of Mary A. Goddard, to set aside two deeds of real estate executed by Mary A. Goddard which are described in the opinion, praying also for an accounting.

In the Superior Court the case was referred to Charles A. Merrill, Esquire, as master. He made a report in favor of the plaintiff on the ground stated in the opinion. The report was confirmed by a decree of the Superior Court granting the relief prayed for; and the defendants appealed.

C. Haggerty & J. R. Kane, for the defendants.

J. S. Gould, for the plaintiff.

BARKER, J. The plaintiff and the two defendants are the only children and heirs of Mary A. Goddard who died intestate on December 19, 1899, at the age of nearly eighty-three years,

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having been a widow for many years. In the present position of the action the turning point is as to the validity of two deeds executed by her on June 6, 1896. One of these deeds purported to quitclaim to the defendants all the grantor's right, title and interest after her death, in certain land in trust to pay over the net income to the plaintiff during her life and upon her death to turn over the land to themselves free of trust. The other deed quitclaimed to the defendants certain other lands reserving and excepting to the grantor during her natural life the use, occupation, income, enjoyment and control of the lands quitclaimed. The lands described in the two deeds constituted all of the grantor's real estate. The bill asks to have them declared void, and for an accounting of the rents and profits of the lands for the time which has elapsed since the grantor's death, upon the ground that the plaintiff and the defendants are tenants in common as the heirs at law of the grantor. Certain allegations as to personalty alleged to have been owned by Mrs. Goddard at the time of her decease have in the course of the proceedings become immaterial to our decision.

After issue joined the cause was sent by the Superior Court to a master to find the facts and state the account and make report thereof together with so much of the evidence as either party might request. Upon the coming in of the master's report it was recommitted, and a supplementary report was made to which the defendants filed exceptions which were overruled and a final decree was entered for the plaintiff. The cause is here upon the defendants' appeal from the order overruling their exceptions to the supplementary report of the master and from the final decree, and it has been considered upon the briefs submitted by the parties. The defendants' brief raises no questions except those as to the validity of the deeds of June 6, 1896, and we treat all others as waived.

The decree declares that the two deeds are void because there was no delivery of the same in the lifetime of the grantor, and for other reasons which in the view we hold are now immaterial. As all the evidence is before us upon the master's report we have examined it with care to see whether the declaration that the deeds are void for want of delivery shall stand.

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At the time of their execution Mrs. Goddard was living in the same house with the two defendants, and this house was in the same yard with their business office. One of the defendants had a wife and children and occupied the upper tenement, while Mrs. Goddard and the other defendant who was unmarried occupied the lower tenement of the house. Since her husband's death the married son had been her confidential man of business, and had the custody of her papers. The two deeds were drafted by an attorney in pursuance of oral instructions given to him by Mrs. Goddard at her home. They were executed by her there when she and the attorney were alone together. They then were taken by the attorney and carried to the defendants' office where they were handed to Emory Goddard, the son who acted as the grantor's man of business and who had the custody of her papers, the attorney saying to Emory that his mother told him to give them to him. The attorney was examined as a witness, and testified "I asked her what I should do with it. She told me to give it to Emory Goddard. He would know what to do with it," and upon cross-examination, "She told me what to do with them after they were executed. She told me to give them to Emory."

Standing by itself this evidence would justify a finding that there was a delivery of the deeds, and if the master had so found upon all the evidence we have no doubt that his finding would have been allowed to stand. But the master has found that the deeds were held by Emory subject to Mrs. Goddard's control, revocation and alteration while she lived, and that he was merely the custodian thereof for his mother and that he so understood it, and the defendants' exception to the finding has been overruled by the Superior Court, and a decree entered declaring that there was no delivery. The finding of the master who saw and heard the witnesses, confirmed by the order of the court to which he made his report, will not be reversed here unless our examination of the reported evidence shows us that the finding is clearly wrong. *Holt* v. *Silver*, 169 Mass. 435.

In support of the master's finding, besides the fact that Emory was Mrs. Goddard's man of business having the custody for her of all her papers, the evidence shows that neither deed was

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recorded until some time after Mrs. Goddard's death; that the other grantee had no knowledge of either deed until after the grantor's death; that after their execution Mrs. Goddard spoke on more than one occasion in a way which would justify the inference that she supposed that in making the deeds she had made her will and that she could change it, and that Emory himself told her that the deeds were in his safe and that if she should ever conclude to change her mind they were not on record and she could fix them as she pleased. Upon this state of the evidence we are not inclined to set aside the master's finding or that part of the final decree which declares the deeds void for want of delivery.

We do not consider whether they are void for other reasons also.

Decree affirmed.

CLARENCE W. BARRON *vs.* CITY OF BOSTON.

Suffolk. November 10, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Tax. Domicil. Words, "Manufacturing", "Manufactory."

One owning a house in a city and another in a town by the sea, can change his residence from the city to the town by forming an intention while abiding at his house by the sea of making it his permanent home for an indefinite period, if in pursuance of that purpose he continues to use it as his home, and this change of residence is none the less effected because the intention of the house owner is formed in the autumn and in the following winter he occupies his house in the city and in the spring goes abroad and does not return to his house at the seashore until June, his family having moved there after the first of May.

"Goods, wares, merchandise and other stock in trade . . . employed in the business of manufacturing or of the mechanic arts" which, under the first exception of R. L. c. 12, § 23, are taxable to the owners thereof in the cities or towns in which they "hire or occupy manufactories, stores, shops or wharves," do not include a printing press and other personal property used in publishing a bulletin of information to bankers every five minutes during business hours, containing information which ceases to be of value as soon as it becomes matter of common knowledge, such a business not being manufacturing nor the place where it is carried on a manufactory within the meaning of the statute, even if the property used in the publishing properly can be called goods, wares or merchandise.

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CONTRACT for the amount of a tax for the year 1901, assessed upon the plaintiff as a resident of Boston and paid under protest. Writ dated September 17, 1902.

In the Superior Court the case was tried before *Gaskill*, J., without a jury. The judge made the findings of fact and the rulings stated in the opinion of the court, and found for the defendant. At the request of the parties, he reported the case for determination by this court. If the finding could be sustained, judgment was to be entered for the defendant; otherwise, judgment was to be entered for the plaintiff for the amount of the tax and costs.

W. R. Sears, (A. Lincoln with him,) for the plaintiff.

A. L. Spring, for the defendant.

KNOWLTON, C. J. This is an action to recover back a tax assessed upon the personal property and poll of the plaintiff on May 1, 1901. The first question is whether he was a resident of Boston at that time.

He owned a house in Boston which he occupied a part of the time. He also owned a large estate in Cohasset, consisting of a dwelling house containing twenty rooms, and a farm house, stables and a cow house. This he occupied a considerable part of the time in each year. Early in the year 1900 he was a resident of Boston, but he stayed with his family at the house in Cohasset from May to December in that year. The judge who heard the case found as follows: "That in the fall of 1900 Mr. Barron, having formed the intention of then and there becoming a resident of Cohasset and while living in his house at Cohasset and before his return to Boston, gave notice to the assessors of the city of Boston that he was a resident of Cohasset; that Mr. Barron some time after this notice was given — in December — moved to his Boston house and was not in Cohasset again until June, but his intention of remaining a resident of Cohasset continued uninterrupted; that he left for abroad in April and before leaving notified his family to be in Cohasset by the first of May, but that as a fact they were not there until shortly after the first of May. I further found as a fact that Mr. Barron did not notify the assessors of the town of Cohasset of his having become a resident there until the summer, in June, 1901, and that Mr. Barron had not carried out his intention of becoming a

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resident of Cohasset by any sufficient overt act; and on these facts I ruled and found the plaintiff was a resident of the city of Boston on May first, 1901, and not of Cohasset."

On this finding of facts the ruling should have been that he was a resident of Cohasset. In *Viles* v. *Waltham*, 157 Mass. 542, the law as to domicil is stated as follows: "To acquire a domicil there must be residence in a place and an intention to make that place one's home." The only act, apart from the intention of the actor, which is absolutely necessary to the acquisition of a domicil in a city or town, is that at some time the person must go to the place and take up his abode there. If he is abiding there while his domicil is elsewhere, and if while so abiding he forms an intention immediately to make it his home permanently or for an indefinite period, and continues to abide there in pursuance of that purpose, he thereby acquires a new domicil. There is no requirement of law that he shall give notice to assessors or to anybody else. The act of going from one place to another, or some other act indicating a change of residence, is often referred to as a foundation for the introduction in evidence of the person's declarations as a part of the *res gestæ*. Declarations accompanying such acts are often important evidence of intention, bearing upon the question whether there was a *bona fide* change of residence. See *Viles* v. *Waltham*, *ubi supra*. In *McConnell* v. *Kelley*, 138 Mass. 372, Chief Justice Morton states the rule as follows: "In determining whether there has been such a change from one place to another, the test is to inquire whether he has in fact removed his home to the latter place with the intention of making it his residence permanently, or for an indefinite time. If he has, he loses his old domicil, and acquires a new one with all its rights and incidents." In *Thayer* v. *Boston*, 124 Mass. 132, 145, Mr. Justice Colt quoted from *Lyman* v. *Fiske*, 17 Pick. 231, 234, a part of the definition of domicil as follows: "It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct." In *Wilbraham* v. *Ludlow*, 99 Mass. 587, this is the first head note: "A person legally capable of choosing or changing his domicil, who is residing in a city or town in this Commonwealth with the purpose of there

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remaining for an indefinite time, and without retaining and keeping up any intention to return to his former home in another city or town in this Commonwealth, has his domicil in the place of his actual residence." Under the law laid down in this and other cases the plaintiff, upon the findings of the judge, as applied to the other admitted facts, acquired a domicil in Cohasset, and a tax upon his poll and his personal estate could not properly be assessed in Boston.

The judge further found that he "had a printing press and other personal property incidental to the publishing of the Boston News Bureau in his Boston office on Exchange Place on May 1, 1901; and ruled that said property was subject to assessment in the city of Boston, even though Mr. Barron was a resident of the town of Cohasset on May 1, 1901; and that in that event the plaintiff's only remedy was by petition for abatement, and that this action could not be maintained on that ground also."

As we already have seen, this property could not be assessed under the first general provision of the R. L. c. 12, § 23, because the plaintiff was not an inhabitant of Boston. If it was taxable in that city at all, it was under the first clause of the exceptions in this section. To be taxable under this clause, property must be "goods, wares, merchandise," or "other stock in trade," or "stock employed in the business of manufacturing or of the mechanic arts," and the owner must hire or occupy a manufactory, store, shop or wharf in Boston. If the property used in publishing the Boston News Bureau was goods, wares or merchandise within the meaning of the statute, it does not appear that the plaintiff hired or occupied a manufactory, store, shop or wharf. The business of publishing the Boston News Bureau, according to the undisputed testimony, was the publication of a bulletin of information to bankers every five minutes during business hours. There is nothing to show that the place of business was a store or shop within the meaning of the statute. The business was not the production of goods, wares or merchandise to be kept for sale or use. It was rather the communication of information which quickly became a matter of common knowledge, and then ceased to be of value. The printing of words upon the paper used was simply the means adopted for the transmission of this intelligence from time to time. To call

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such a business manufacturing, or to call the office and rooms in which it was conducted a manufactory, would be giving the words a peculiar and unusual meaning. The finding, therefore, does not bring the case within the statute. *Loud* v. *Charlestown*, 103 Mass. 278. *Charlestown* v. *County Commissioners*, 109 Mass. 270, 272. *Hittinger* v. *Westford*, 135 Mass. 258, 262. *Farwell* v. *Hathaway*, 151 Mass. 242. *Ingram* v. *Cowles*, 150 Mass. 155, 157. *Hittinger* v. *Boston*, 139 Mass. 17, 18. *Wellington* v. *Belmont*, 164 Mass. 142, 143.

Judgment for the plaintiff.

HORACE E. BLACK *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 11, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence. Street Railway.

A passenger in a car of a street railway company cannot recover from the company for injuries caused by a collision of the car with a team driven at night without lights at a pretty fairly lively gait on an unlighted street, crossing the car track from an intersecting street, from which the driver could have seen the car when it was one hundred feet or less away from the corner and when he himself was within five hundred feet of the corner, and where the car was not running at an excessive rate of speed, and the motor was reversed a second or so before the collision, apparently as soon as the team emerged from the darkness into the space lighted by the lights of the car, the only negligence shown being that of the driver of the team.

TORT for personal injuries received while a passenger on a car of the defendant. Writ dated March 20, 1902.

In the Superior Court the case was tried before *Harris*, J. The following statement of the case is taken from the opinion of the court:

This is an action by a passenger for injuries suffered by him under the following circumstances. The plaintiff was standing in the forward end of the aisle of one of the defendant's cars, the seats being occupied, with his hand on the handle of the door, and looking ahead. The car was going north on Broadway in

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Everett. The plaintiff testified that as the car came to the intersection of Dexter Street he saw a horse on the track, some twenty or thirty feet away, and realized that there would be a collision. To avoid being hurt by it he stepped out on to the platform, but being too late was thrown violently against the forward end of the car. He also testified that the car was running ten miles an hour, and that until he saw the team the car had not slowed down; that simultaneously with the collision, or a second or so before, the reverse power was applied by the motorman. The only other witness called by the plaintiff was the driver of the wagon. He testified that he was driving west with a load of coke in a furniture wagon, at a pretty fairly lively gait, and never saw the car until the horse's head was ten or twelve feet from the track; that the car was then two hundred feet away; that there was no light there except the light on the car; that he could see down Broadway for a distance of one hundred feet when he was on Dexter Street anywhere between the corner of Dexter Street and Broadway and a point five hundred feet east of the corner; that the car struck his left hind wheel and swung his cart round parallel with the car, facing in the opposite direction; that he started from the coke works at five or six minutes after six o'clock in the afternoon. The accident happened on January 31, 1902.

It was agreed that the plaintiff was in the exercise of due care.

The presiding judge directed the jury to find a verdict for the defendant, and the case is here on an exception to that ruling.

J. J. O'Connor, for the plaintiff.

C. S. French, for the defendant.

LORING, J. [After the foregoing statement of the case.] We are of opinion that the ruling was right. To recover, the burden was on the plaintiff to prove that the collision was caused by the negligence of the defendant. In place of proving that, so far as the proof went it showed that it was caused by the negligence of the driver of the cart. The case which the plaintiff made out was the case of the driver of an unlighted cart on an unlighted street, in the night time, driving along without seeing a car on an intersecting street until his horse's head was within ten or twelve feet of the track, although on his own testimony he might

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have seen the car when it was one hundred feet or less away from the intersection of the two streets, and when he was within five hundred feet of the corner. The car was not running at an excessive rate of speed, and the motor was reversed a second or so before the collision, apparently as soon as the wagon emerged from the darkness into the space lighted by the lights of the car. See in this connection *Hamilton* v. *West End Street Railway*, 163 Mass. 199.

The plaintiff has argued that on the only testimony as to lights on the street on which the cart was being driven it might be found by the jury to mean that there was no light which enabled the driver to see the motorman on the car platform. If that is so, the plaintiff failed to prove that the street was lighted, and the result is the same; it must be assumed not to have been lighted.

Exceptions overruled.

MILES L. MOWRY, trustee, *vs.* ABBIE N. REED.

Franklin. November 14, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Bankruptcy, Rights of trustee. *Conversion.* *Fraud*, Conveyance with intent to defraud future creditors. *Husband and Wife.*

In an action by a trustee in bankruptcy against the wife of the bankrupt for a sum of money alleged to be the property of the bankrupt which he fraudulently placed in the hands of the defendant and she converted to her own use, the defendant can be asked on cross-examination what she did with the money received as part of the proceeds of certain property sold by her husband, and on her answers showing that a short time before her husband was examined in bankruptcy proceedings she drew the money out of a bank at her place of residence and deposited it in two banks thirty miles away and that in the bankruptcy proceedings both she and her husband refused to tell where the money was, she can be asked further whether it was not a long time afterwards that she used the money, this evidence being admissible upon the issue whether the defendant converted the money to her own use.

A transfer by a husband through a third person to his wife cannot be avoided as fraudulent by the trustee in bankruptcy of the husband's estate merely by proving that the transfer was made with a design to settle the property on the wife, so that it should not be exposed to the hazards of the husband's future business or be liable for any future debts he might contract, but if a husband makes such a transfer with the actual intent of putting the property where it cannot be

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reached by creditors to satisfy debts which at the time he intends to contract and has reasonable ground to believe that he may not be able to pay, even if he does not have that intention as to any particular debt or debts and all his previous debts have been paid, the transfer can be avoided as fraudulent by the trustee in bankruptcy. In this case it was held that the evidence warranted such a finding.

TORT by the assignee in bankruptcy of the estate of Frank E. Reed of Athol, against the wife of the bankrupt, for $3,500 alleged to have been placed fraudulently by the bankrupt in the hands of the defendant and by her converted to her own use. Writ dated October 7, 1901.

In the Superior Court the case was tried before *Maynard*, J., who refused to rule that the plaintiff could not maintain his action, and submitted the case to the jury. The jury returned a verdict for the plaintiff for the full amount claimed; and the defendant alleged exceptions.

D. Malone & C. N. Stoddard, for the defendant.

F. L. Greene & W. A. Davenport, for the plaintiff.

BARKER, J. The main facts concerning the occasion for this action are these: The defendant's husband for about fourteen years up to the spring of 1897 had kept a hotel, and during that time she had worked constantly and efficiently helping in that undertaking. Upon parting with his interest in the real estate of the hotel at that time he caused the title to a house and lot which he was to have in exchange to be conveyed to his wife, saying that it was her share of the property and that she had worked hard and earned it. The title so placed in her remained until November 23, 1897, when upon the occasion of her husband's purchase of the lease, furniture and stock of another hotel the title was conveyed by her to the person with whom her husband's bargain was made. In the deal that person received a deed of the title and certain shares of stock, and the defendant's husband received a lease of the hotel, authority to sell liquors under a license, indemnity against claims of a prior lessee and a bill of sale of the furniture and fixtures of the hotel. The defendant's husband ran this hotel until January 30, 1901, when the stock, furniture and fixtures were sold for cash, of which $3,500 was paid by the purchaser to the defendant in a bank check or draft.

On April 2, 1901, the defendant's husband became a voluntary

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bankrupt, and this action is brought by his trustee in bankruptcy to recover the $3,500 on the ground that it was property of the bankrupt transferred to her in fraud of his creditors.

On June 20, 1898, a bill of sale of the furniture and fixtures was made by the bankrupt to his brother, and another bill of sale of the same property given by the brother to the defendant. Upon the sale of January 30, 1901, the defendant gave a bill of sale of the same property to the purchaser. The whole price then paid by him was $5,260, of which the sum of $3,500 was taken by the defendant and the balance by her husband.

After a jury trial resulting in a verdict for the plaintiff the case is here upon the exceptions of the defendant to certain questions which the plaintiff was allowed to ask her upon her cross-examination as a witness, and upon an exception to a refusal to rule that upon all the evidence the plaintiff could not maintain his action.

1. The questions excepted to upon the defendant's cross-examination had reference to what she did with the $3,500, and from her answers it appeared that having received the check or draft on January 30, 1901, she kept it until April 27, 1901, when she drew the money upon it at a bank in the place of her residence, and on the same day carried it to a city some thirty miles away and there deposited it in two banks; that her husband having been under examination in bankruptcy on May 8, 1901, and having refused to tell where the money was, on May 9, 1901, she went to the banks in which she had deposited the money and drew it out, and that thereafter upon being examined in the bankruptcy proceedings she by advice of her counsel refused to tell where the money was. The last of the questions excepted to was whether it was not a long time afterwards when she used the money.

We think all the questions excepted to were admissible upon the issue whether as alleged in the declaration and denied in the answer the defendant had converted the $3,500 to her own use.

2. In deciding whether the case should have been submitted to the jury we assume in favor of the defendant that the conveyance to her in the spring of 1897 of the house and lot by direction of her husband and as her share of the property earned by her work gave her a good title which could not be avoided by

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future creditors. When however she conveyed that title in November, 1897, it was a fair inference from the evidence that she allowed her husband to take as his own the property the title to which was transferred to him in the transaction of which her deed was a part. From that time until June 20, 1898, the legal title to the whole property was in the husband, and it could be found from the evidence that before either the husband or the defendant took any steps to have the title to the furniture transferred to the latter, the husband had begun to find his business unprofitable, and had reason to know that unless things changed for the better he would become insolvent.

In the transaction of November, 1897, he had himself furnished a considerable proportion of the consideration for which the bill of sale of November 23, 1897, was made to him, and it could be found that the other party to that transaction knew of no intention that the defendant or any one except her husband with whom alone the bargain was made should have any interest in the property. The jury could find that the bills of sale of June 20, 1898, were not a mere means of correcting an error by which the bill of sale of November, 1897, had been made to the husband, but were an actual transfer of the husband's property to the wife, and without a valuable consideration. We assume that the husband was not then insolvent and that the debts which he then owed were paid afterwards in full. If however the husband made the transfer with an actual intent to put the property so that it could not be come at by creditors for debts which at the time he intended to contract and which he had reasonable ground to believe that he might not be able to pay, even if he did not then have that intention as to any particular debt or debts, the transfer was fraudulent and void, and could be found to be so if the evidence went far enough, notwithstanding the fact that all debts which the husband owed when the transfer was made had been paid. *Winchester* v. *Charter*, 12 Allen, 606, 610, 611. But such a finding would not be warranted by proof simply that the transfer was made with a design to settle the property on the defendant so that it should not be exposed to the hazards of his future business or liable for any future debts which he might contract. *Jaquith* v. *Massachusetts Baptist Convention*, 172 Mass. 439, 446. *Jaquith* v. *Rogers*, 179 Mass. 192.

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In the present case the evidence tended to show that while the husband on June 20, 1898, was not insolvent he then had no considerable amount of property, and none except the stock, fixtures and furniture of the hotel and a savings bank deposit of $1,200 pledged to another bank for a loan of $1,000; that he then had no license for the sale of liquors and that his business was and for some little time had been a losing one, and that the amount of his property aside from that which was transferred to his wife on June 20, 1898, was but little in excess of the amount which he then owed in current debts; that he was in the habit of borrowing money from and of lending his credit to the brother through whom the transfer was made; that there was no change of possession of the property transferred, and no change in the manner of conducting the business, and that the insurance on the property transferred was still carried in the husband's name; and finally that after having carried on the business at a loss until January, 1901, he sold it out by a transaction entered into in his own name alone, and caused much the greater part of the proceeds of the sale to be paid to the defendant when he was owing more than $7,000 largely to concerns with whom he was dealing on June 20, 1898, and to whom he was then in debt for current bills, and from whom it might be found he then intended to buy in the future upon credit, he then having reasonable ground to believe that he might not be able to pay.

While not conclusive, we think this evidence fairly justified the inference that the husband made the transfer with an actual intent to defraud future creditors.

Exceptions overruled.

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JEANETTE F. TOZIER *vs.* HAVERHILL AND AMESBURY STREET RAILWAY COMPANY.
HOLCY M. TOZIER *vs.* SAME.

Essex. November 14, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence. Street Railway. Marriage. Husband and Wife.

Although it is true that in determining whether a person acts with reasonable care in a sudden emergency the fact that he is obliged to act quickly and without an opportunity for deliberation is to be taken into account, this does not absolve the motorman of an electric car when required to act in a sudden emergency from the obligation to exercise reasonable care under the circumstances.

A ceremony of marriage in this Commonwealth between persons against one of whom a divorce has been granted within two years under Pub. Sts. c. 146, § 22, is invalid, and such a marriage only can be shown to have become valid under R. L. c. 151, § 6, by the parties to it living together as husband and wife after the removal of the impediment, by proving that the illegal marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, and that they continued to live together in good faith on the part of one of them.

In an action by an alleged husband for damages incurred in consequence of personal injuries to his wife, the plaintiff must prove as a necessary part of his case that he is the husband of the person injured.

TWO ACTIONS OF TORT, the first by Jeanette F. Tozier for personal injuries sustained while a passenger in an open electric car of the defendant, which ran off the track on a down grade on a street in the outskirts of Haverhill and ran into a bank and the stump of a tree at the side of the road, and the second by Holcy M. Tozier, as the husband of Jeanette, for damages alleged to have been incurred by him in consequence of her injuries. Writ dated July 15, 1902.

At the trial in the Superior Court before *Hardy*, J. the jury returned a verdict for the plaintiff in each case, for the plaintiff in the first case in the sum of $10,000, and for the plaintiff in the second case in the sum of $2,000. The defendant alleged exceptions, raising the questions stated by the court.

C. W. Bartlett & E. R. Anderson, for the defendant.

T. W. Coakley, D. H. Coakley & C. C. Johnson, for the plaintiffs.

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KNOWLTON, C. J. These are two actions respectively brought, one to recover for injuries to the female plaintiff from the alleged negligence of the defendant in running a car in which she was a passenger, and the other to recover damages resulting from her injury suffered by the male plaintiff, as her husband. It was conceded that she was in the exercise of due care, and the only exception now relied on in her case is to the refusal of the judge to give the jury this instruction which the defendant requested: "If the jury find that the motorman did not exercise the best judgment which the case discloses could have been exercised, he being called upon to act in a sudden emergency, his error would not be such negligence as would make the defendant liable." If the request contained nothing but a statement of the familiar principle that in determining whether one acts with reasonable care in a sudden emergency, the fact that he is obliged to act quickly and without an opportunity for deliberation is to be taken into account, and he is not to be deemed careless merely because he failed to do that which would have been best as shown by subsequent events, it properly might have been given. See *Ingalls* v. *Bills*, 9 Met. 1; *Cody* v. *New York & New England Railroad*, 151 Mass. 462, 468, 469; *Gannon* v. *New York, New Haven, & Hartford Railroad*, 173 Mass. 40. But it went further, and included the proposition that the motorman's error in not exercising the best judgment in a sudden emergency, if the jury found such an error, would not be actionable negligence, whatever the error might be in other particulars. The descriptive language in the request was applicable to an error which might have been very gross, and entirely inconsistent with the exercise of due care, as well as to an error which might have been excusable. We are of opinion that the instruction was properly refused, and that the exception in this case should be overruled.

The question in the other case grows out of the fact that, at the time of the marriage of the two plaintiffs, the female plaintiff had a former husband living who had obtained from her a divorce for desertion, which had been made absolute less than two years before. It is declared by the Pub. Sts. c. 145, § 4, which were in force at the time of the marriage, that "all marriages contracted while either of the parties has a former wife or

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husband living, except as is provided in chapter one hundred and forty-six, shall be void." In the Pub. Sts. c. 146, § 22, (R. L. c. 152, § 21,) there is a provision in reference to divorced persons, "that the party against whom the divorce was granted shall not marry within two years from the time of the entry of the final decree of divorce." The record was put in evidence, and from the facts stated we infer that the divorce was granted in Massachusetts where the parties lived. The ceremony of marriage of the present plaintiffs was performed in Haverhill. It is plain, therefore, that the marriage was invalid. *Googins* v. *Googins*, 152 Mass. 533. *Cook* v. *Cook*, 144 Mass. 163.

The plaintiff invokes the R. L. c. 151, § 6, first enacted in the St. 1895, c. 427, which makes certain illegal marriages valid after the impediment to the marriage has been removed by the death or divorce of the other party to the former marriage, provided the marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, and provided they continue to live together in good faith on the part of one of them. See *Lufkin* v. *Lufkin*, 182 Mass. 476; *Commonwealth* v. *Josselyn*, 186 Mass. 186. But there was no evidence at the trial tending to show that either of the parties entered into the marriage contract under such circumstances as to bring the case within this statute. The evidence tended to show the contrary. Much less could it be said as matter of law that the case was covered by this statute.

The question as to the validity of the marriage was treated by the judge as collateral, and the jury were instructed that they were to consider the male plaintiff as *de facto* and legally the husband of the other plaintiff. We are of opinion that this was erroneous. The right of action depended upon the alleged fact that he was the husband of the female plaintiff, and this fact was to be proved like any other fact in the case.

In the case of Jeanette F. Tozier the exceptions are overruled and in the case of Holcy M. Tozier the exceptions are sustained.

So ordered.

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PATRICK J. HAYES *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 15, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Employer's liability. *Railroad.*

A railroad company is not liable to a workman employed in loading freight at its freight house into cars, who is injured when hauling a heavily loaded truck over a running board or skid serving as a bridge between two freight cars, from one end of the skid slipping off its support because not fastened by a cleat and causing the workman and his load to fall, if it is the custom to fasten the ends of the skids by nailing cleats across them and this is left to the workmen, who find hammers, nails and small pieces of wood for the purpose wherever they can, by going to different parts of the freight house or a short way outside of it.

TORT, with counts at common law and under the employers' liability act, by a trucker employed by the defendant to load freight into cars at its freight houses on Congress Street, in that part of Boston called South Boston, for injuries from falling with a heavily loaded truck while passing from one freight car to another, by reason of the skid * or running board, over which he was drawing his truck, slipping off at one end on account of the alleged negligence of the defendant in allowing it to remain unfastened. Writ dated August 17, 1900.

In the Superior Court *Bell*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. B. Grant, for the plaintiff.

J. L. Hall, for the defendant.

LORING, J. The plaintiff was one of a gang of workmen employed in loading freight from the house where it was re-

* In *Foster* v. *New York, New Haven, & Hartford Railroad, ante*, 21, a similar appliance was called a "rising board" and in the present case most of the witnesses spoke of the skid as a "riseboard." "Skid" seems to be the more general term for such a bridge, as the term "riseboard" when used accurately implies a difference in level, which in this case if it existed was of no consequence. In *Murphy* v. *New York, New Haven, & Hartford Railroad, ante*, 18, the appliance used for the same purpose was a "brow" with hooks at one end and bevelled at the other.

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ceived by the defendant, into the cars which were to carry it to its destination. There were several tracks laid parallel with the side of the freight house, and the course of business was to use the intervening cars as a bridge to reach a car in the train on the outside track. Skids were placed from the house to the first car and between cars on the intervening tracks. On the day of the accident the plaintiff was directed to carry a large case on his truck to the car on the fourth track. The case was so large that it had to be placed on the iron end of his truck, instead of being loaded on the inside of the iron end, and the plaintiff had to move forward in a stooping position in pulling the truck, to prevent it from tipping off the end of the truck. As he passed over the skid between the car on the third and that on the fourth track the skid slipped and the plaintiff, the skid and the case he was pulling fell to the ground causing the injuries complained of. This was the first time he had been over this skid on that day. The jury were warranted in finding that the skid slipped because it was not cleated.

On the conclusion of the plaintiff's evidence the presiding judge directed a verdict for the defendant, and the case is here on an exception to that ruling.

There was evidence that the defendant's rule was that all skids should be cleated. The skids in house No. 7 were fitted with iron pins at each end of the skid, to keep the skid in place. But those in use at house No. 6, the house in question, had no pins. The practice had been to nail down cleats across the ends of these skids, to keep them from slipping when the cars were not of the same height, but not to cleat them when they were even in height. It also appeared that the matter of laying the skids and of cleating them was left to the workmen. The defendant's contention is that it was not liable for the skid in question not having been cleated; that it had left that matter to the workmen and had provided them with the necessary material.

So far as the skids were concerned over which the plaintiff had to go from the warehouse to the car on the outside track, the safety of the plaintiff was dependent on the temporary adjustment of instrumentalities in the course of the work on which the plaintiff was employed. If the employer leaves such a

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matter to the workmen, furnishing them with the means of making the instrumentality safe, his duty to his employees is performed. Without citing all the cases, it is enough to refer to *Johnson* v. *Towboat Co.* 135 Mass. 209, and to the last cases on the point; *Miller* v. *New York, New Haven, & Hartford Railroad*, 175 Mass. 363; *Haskell* v. *Cape Ann Anchor Works*, 178 Mass. 485, 487.

One witness testified that the defendant had not supplied hammer, nails and boards for this purpose, but on cross-examination he testified that "all that you need to cleat a board is a little piece of wood nailed down so as to keep the running board steady. Sometimes there are lots of blocks there. You can find a few blocks and pieces of wood about the house, and they could get nails and things to drive them in if they wanted. . . . There is generally lumber on the outside platform right by the door of the house and any one could get that lumber that wanted to." Another of the plaintiff's witnesses testified on direct examination: "There were no special boards furnished for that purpose. He would go into the house and find some kind of a board and break it up for a cleat. There would be boards that he could find there, and sometimes he might have a hard time in finding any. Sometimes he might have to go outside of the house to get the board, but he would go where it was handiest to find them; that is, find them the quickest way he could do so; that the gang would keep working." Again: "Upon the day of the accident he didn't have any hammer. No car man in that house carried a hammer especially. He had to go to different parts of the house to get nails and hammer, and if he saw a board that he thought needed cleating he would go and hunt up the hammer and nails. He would have to go to different parts of the house. The hammer and nails were lying in a box." And on cross-examination: "There were plenty of nails in the house, and though he had none with him he could get them if he wanted to and he could get all the boards that he wanted. There were plenty of them."

On this evidence we are of opinion that the defendant had furnished the material necessary to cleat the skids. See in this connection *Callahan* v. *Phillips Academy*, 180 Mass. 183.

What distinguishes this case from *Murphy* v. *New York, New*

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Haven, & Hartford Railroad, *ante*, 18, is that in that case the matter of adjusting the brow used as a skid was left to a superintendent, and there was evidence that he was negligent in regard to the placing of the brow.

Exceptions overruled.

GEORGE E. McQUESTEN *vs.* ATTORNEY GENERAL & another.

Essex. November 18, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & BARKER, JJ.

Attorney at Law. Attorney General.

In a proceeding in which the Commonwealth is a party the attorney general may authorize an attorney at law, who is not an assistant attorney general or a district attorney and who represents a certain town in the proceedings, to take and enter an appeal for him in behalf of the Commonwealth.

KNOWLTON, C. J. This is a petition for a writ of prohibition to prevent the trial in the Superior Court of an appeal from a decree of the Court of Land Registration in favor of the petitioner, upon an application for the registration of his title to certain land in the town of Marblehead. This appeal was taken by the attorney general, acting by authorized attorneys who also represented the town of Marblehead. The principal contention of the present petitioner is, that such an appeal could be taken only by the attorney general, or assistant attorney general, or district attorney, in person, and that the attorney general could not authorize other attorneys to take and enter an appeal which would give the Superior Court jurisdiction.

On the original petition there was a question whether there was a public landing place over the land described, and notice of the application was accordingly given to the attorney general, under the R. L. c. 128, § 31. The interests of the public were involved, and the Commonwealth was a proper party. Under § 13 it had a right to appeal from an adverse decision. The attorney general entered an appearance personally in the Court of Land Registration, but filed no claim. Afterwards, with the consent of the petitioner, who reserved all legal rights, attorneys

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representing the town presented the claim of the Commonwealth in that court, under authority in writing from the attorney general. The petitioner objected to the authority of these attorneys to take an appeal for the attorney general, and moved to dismiss the appeal. The motion having been denied, this petition was brought.

Previously to the enactment of the St. 1896, c. 490, it had long been the practice of the attorney general, in certain civil cases to which he or the Commonwealth was a party, to be represented by attorneys procured and paid by relators, or other private parties who had a special interest in the maintenance of the public rights in question. *Attorney General* v. *Metropolitan Railroad*, 125 Mass. 515. *Kenney* v. *Consumers' Gas Co.* 142 Mass. 417. *Attorney General* v. *Tarr*, 148 Mass. 309. *Attorney General* v. *Revere Copper Co.* 152 Mass. 444. *Attorney General* v. *Abbott*, 154 Mass. 323. *District Attorney* v. *Lynn & Boston Railroad*, 16 Gray, 242. *Attorney General* v. *Butler*, 123 Mass. 304. *Attorney General* v. *Parker*, 126 Mass. 216. *Attorney General* v. *Boston*, 123 Mass. 460. This had been done with the approval of the court. *Parker* v. *May*, 5 Cush. 336, 338. *Commonwealth* v. *Boston & Maine Railroad*, 3 Cush. 25, 48. The rule as to criminal prosecutions always has been different. *Commonwealth* v. *Knapp*, 10 Pick. 477, 481. *Commonwealth* v. *Williams*, 2 Cush. 582, 584. *Commonwealth* v. *Scott*, 123 Mass. 222, 234. But even in civil cases the court has recognized the desirability of having public interests actively represented in court by a public officer. *Burbank* v. *Burbank*, 152 Mass. 254, 256, and cases above cited. Emphasis was given to this view in *Attorney General* v. *Adonai Shomo Co.* 167 Mass. 424, which was an information brought in the name of the attorney general, but not actively prosecuted by him. A little before the argument of this case in the full court, but after the hearing before the single justice, the St. 1896, c. 490, (R. L. c. 7, §§ 1–9,) was passed, which enlarged and particularly defined the duties of the attorney general. Under this act the attorney general appears in all the courts of the Commonwealth, not only for the Commonwealth, but for the secretary, the treasurer and the auditor, and for all heads of departments, State boards and commissions, in all suits and other civil proceedings, except upon criminal

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recognizances and bail bonds, in which the Commonwealth is a party or interested, or in which the official acts and doings of said officers are called in question. This put an end to the practice which previously had prevailed to some extent in State boards and commissions, of employing private counsel in public matters at the expense of the Commonwealth. The statute also provides that "All such suits and proceedings shall be conducted by him or under his direction." In this way official responsibility for these suits and proceedings, at all stages of their progress, is secured. The statute also gives the attorney general power to appoint such assistants as the duties of the office require, and with the approval of the Governor and Council to fix their compensation. He may also, subject to like approval, employ such additional legal assistance as he may deem necessary in the discharge of his duties. In this way a very large and important official responsibility rests upon the attorney general. All of this business in which the Commonwealth is interested must be conducted in court under his direction. Doubtless it was expected that in ordinary cases this direction would be given most effectually while having the business in court done by his regular assistants, or by other attorneys employed and paid under the authority of the statute. But we are of opinion that this statute was not intended to limit his previously existing power to give jurisdiction to the courts, and to bind himself as a party representing the public, in the ordinary way, through an unofficial attorney at law, authorized to represent him. It might be inconvenient, and it is unnecessary, to leave the attorney general with no power in a civil proceeding to act in court otherwise than in person, or through a regular assistant, or a person appointed with the approval of the Governor and Council. It would require plain provisions of the statute to indicate a legislative purpose so to limit his power. As a party in a civil proceeding in court, or as an officer representing public interests, he is bound by the action of his authorized attorney, as any other party is. In reference to this, if the requirement that the business shall be done under his direction implies that it shall be done by a regular assistant, or by a person appointed with the approval of the Governor and Council, the statute is merely directory. Since the enactment of the statute cases have been

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heard repeatedly in which the attorney general was a party, and was represented by private counsel without objection. *Attorney General* v. *Dole*, 168 Mass. 562. *Attorney General* v. *McCabe*, 172 Mass. 417. *Attorney General* v. *Williams*, 174 Mass. 476; *S. C.* 178 Mass. 330. *Attorney General* v. *Drohan*, 169 Mass. 534. *Attorney General* v. *Goodell*, 180 Mass. 538. *Attorney General* v. *Vineyard Grove Co.* 181 Mass. 507.

The fact that the attorneys who represented him in taking the appeal were acting also for the town of Marblehead, does not affect the validity of their action. There was no inconsistency between the claims of these two parties which should preclude counsel for one from representing the other in taking the appeal. Indeed, it appears that they agreed in their contention in regard to the acquisition of public rights in the landing place.

Our view of this part of the case makes it unnecessary to consider the question whether, if the appeal was wrongly taken, the petitioner has another remedy that would make it unnecessary to issue a writ of prohibition.

Petition dismissed.

H. H. Buck, for the petitioner.

H. P. Moulton, *J. H. Casey* & *U. G. Haskell*, for the respondents.

MICHAEL CASHMAN & another *vs.* LONDON GUARANTEE AND ACCIDENT COMPANY.

Essex. November 30, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Insurance, Against liability.

A policy insuring a stevedore against liability for accidents to his employees covers liability for an injury to an employee caused by a defect in a platform forming part of a coal run on a wharf belonging to a coal company which the stevedore has agreed to keep in repair under a contract to unload all the coal coming to the coal company at that wharf.

CONTRACT, by a firm of stevedores, on a policy insuring the plaintiffs against liability for injuries to employees "fatal or

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non-fatal," alleging such liability incurred and damages paid by reason of fatal injuries to one Garant, who fell from a defective platform of a coal run to the deck of a barge while employed by the plaintiffs in unloading coal from the barge. Writ dated March 19, 1903.

In the Superior Court the case was heard upon an agreed statement of facts, called an agreed statement of evidence, by *Stevens*, J., without a jury. He found for the plaintiffs in the sum of $5,403.69, and gave judgment for that amount. The defendant appealed.

G. C. Dickson, C. S. Knowles & H. P. Moulton, for the defendant.

B. B. Jones & N. N. Jones, for the plaintiffs.

KNOWLTON, C. J. This case was submitted upon an agreed statement of facts and evidence, in which it was stipulated that, "if the defendant is entitled as matter of law to a judgment in its favor on the evidence stated, judgment is to be so entered, otherwise judgment is to be entered for the plaintiffs" in a stated sum. Judgment having been entered for the plaintiffs, the defendant appealed, and the question before us is whether there is anything in the facts and evidence to warrant a finding for the plaintiffs.

The action is to recover upon a policy of insurance "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy by any employee or employees of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given, in and during the continuance of the work described in the said schedule." The occupation of the plaintiffs mentioned in the schedule was that of stevedores and contractors. One of their employees, working as a stevedore, accidentally suffered an injury which quickly caused his death after conscious suffering. An action was brought against the plaintiffs, which was defended by this defendant, and a judgment was recovered which these plaintiffs were obliged to pay. See *Garant* v. *Cashman*, 183 Mass. 13. The evidence in that case is a part of the agreed statement in this, and it shows that there was a liability of the plaintiffs for an accidental injury to one of their employees engaged in the busi-

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ness of a stevedore. On its face, the liability seems plainly to come within the terms of the policy, and to warrant a recovery in this action.

The ground of the liability of these plaintiffs in the former action was a defect in their ways, works or machinery, provided for the use of their employees, a part of which was a runway, with an apron or platform attached to it by hinges, which when in use was lowered to a level with the runway, and held in place over the vessel that was being loaded, by hinges and chains. Along each side of the apron were posts and a rope, intended for the protection of the persons working upon it. One of these posts was found to be defective, and this defect was the cause of the injury to the plaintiff's intestate in the former action. The present plaintiffs had entered into a contract with the coal company that owned the runway to keep it in repair, so long as they conducted the business of unloading coal at that place. Their liability for the accident may have been founded on this contract, made in connection with their business as stevedores, and the defence in this action is, that such a contract, creating such a liability to employees, was so foreign to the business of stevedores as to take the liability out of the provisions of the policy of insurance.

In the first place, on the evidence, it may be doubtful whether as matter of law this runway was not a part of the ways, works or machinery of the present plaintiffs, furnished to employees for their use in the business, such as to create a liability to them for its condition, in the absence of such a contract to keep it in repair, and notwithstanding the ownership of the coal company. See *Coffee* v. *New York, New Haven, & Hartford Railroad*, 155 Mass. 21, 23; *Trask* v. *Old Colony Railroad*, 156 Mass. 298, 303; *Hayes* v. *Philadelphia & Reading Coal & Iron Co.* 150 Mass. 457; *Spaulding* v. *Flynt Granite Co.* 159 Mass. 587. But if there would have been no liability to employees without the contract which made the present plaintiffs primarily responsible for the condition of the runway, there is nothing in the evidence to show that such a contract might not properly be made in connection with the plaintiffs' business as stevedores. It seems to us incidental to the business in which they were engaged. They were, and had been for a number of years, under a contract to

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unload the coal coming to the coal company at this wharf. Certainly it cannot be said, as matter of law, that such a contract was so improper or unreasonable as to take their liability to their employees, on account of it, out of the general provisions of the policy. To have that effect, a contract must be such as to make the liability not the liability of a stevedore within the meaning of the policy, but a separate and independent liability.

Judgment affirmed.

COMMONWEALTH *vs.* ANDREW M. CLANCY & another.

Suffolk. November 30, 1904. — January 4, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Practice, Criminal, Exceptions. *Larceny. False Pretences. Evidence,* Of other crimes to show intent, Presumptions and burden of proof.

Where a criminal case coming before this court on the defendant's exceptions is submitted on briefs an exception not mentioned in the defendant's brief is considered waived.

At the trial of an indictment for larceny, consisting of the alleged fraudulent sale of a business at an amount grossly in excess of its value by means of false pretences, evidence, that the sales of goods after the transfer of the business immediately were much less than they had been represented to be, is admissible to show that the representations as to the amount of the business before the transfer were false, as it is not to be expected that an established business will diminish seriously at once without some good reason.

At the trial of an indictment of two defendants for larceny, consisting of the alleged fraudulent sale of a business to a certain person at an amount grossly in excess of its value by means of false pretences, if the evidence discloses a general conspiracy between the two defendants to cheat whomever they could by selling out a pretended business for cash by means of false representations, evidence of the acts of either or both of the defendants in deceiving other persons in a similar manner is admissible to show the knowledge of each of the defendants of the falsity of the representations made and of the intention of each to cheat by means of such representations.

The following instruction in regard to the presumption of the innocence of the defendants in a criminal case was held to be a correct statement of law: "The jury start with the presumption that the defendants are not guilty until the evidence satisfies you differently. But when the evidence . . . satisfies you beyond any reasonable doubt, the evidence introduced by the government and the evidence of the defendants, when you are satisfied on that evidence, that the defendants are guilty, then you should say so, otherwise you say the case is not proved and return a verdict of not guilty."

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INDICTMENT, found and returned on November 7, 1903, charging the defendants with larceny in six counts, the first count charging the larceny on October 15, 1899, of $250 from Edward L. Pickard, the second count charging the larceny on October 31, 1899, of $1,950 from Edward L. Pickard, the third count charging the larceny on February 12, 1900, of $250 from Ammi B. Campbell, the fourth count charging the larceny on March 16, 1900, of $1,750 from Ammi B. Campbell, the fifth count charging the larceny on March 25, 1903, of $500 from Watson H. Brasee, and the sixth count charging the larceny on March 28, 1903, of $2,500 from Watson H. Brasee.

At the trial in the Superior Court before *Bond*, J. both of the defendants were found guilty on each count; and thereafter alleged exceptions.

J. B. Moran & M. J. Sullivan, for the defendants.

F. H. Chase, Second Assistant District Attorney, for the Commonwealth.

BARKER, J. The trial was upon an indictment in six counts charging the defendants with the commission of larcenies by securing money from three different persons by false pretences, namely, from one Pickard in October, 1899, from one Campbell in February and March, 1900, and from one Brasee in March, 1903. The general nature of the false pretences charged was concerning the value of a business upon the sale of which the money was paid. The case is here upon a bill of exceptions of which some relate to evidence and others to the charge to the jury and to the refusal of requests for instructions. The case having been submitted upon briefs, and that of the defendants containing no statement in regard to their exceptions as to evidence we consider those exceptions as waived. The false pretences relied on to show that the getting of the money from Pickard in October, 1899, was a larceny were, in short, representations that Clancy then was the owner of a certain business the weekly cash receipts of which amounted to $800; that Murphy had been trying to buy the business and that Clancy had been unwilling to sell until then; that Clancy's price was $5,000; that Murphy had $2,500 to put into the business; that Clancy desired to retire because he had made money enough there, was too old and had outside interests; that it was strictly

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a cash business; that the sales averaged $800 a week or more, and that the profit on sales was at least twenty-five per cent; that the sales for the week ending October 14, 1899, amounted to nearly $800; that there were then on hand about $1,200 worth of groceries and from $300 to $500 worth of meats; that the fixtures had cost and were then worth about $1,000; that Clancy had worked up the business by years of hard work; that Murphy knew Clancy only as a customer of Murphy's; that Murphy then did a wholesale provision business, and that Clancy was a good customer of his, and had bought nearly all the meat for Clancy's store of Murphy for several years.

The evidence tended to show that by means of these false pretences Clancy and Murphy in confederation with each other cheated Pickard out of his money in this way. Murphy got in communication with Pickard by means of an advertisement which Murphy inserted in a newspaper giving notice that there was "Wanted, a good honest man with $2,500 to join with me in purchasing a good grocery and provision store" and making other representations in the line of the false pretences charged. Pickard then was induced to join with Murphy in buying the business from Clancy, Pickard paying his half of the price in cash and Murphy falsely pretending to pay his half also, and Pickard and Murphy after the business was turned over to them going on with it for a short time. It at once was found that the receipts were but little, the stock of goods much smaller than had been represented, and that the business was practically worth nothing. Thereupon Murphy declared that they had been cheated and that the only way out was to sell it back to Clancy for what he might be willing to pay, and it was so resold for the sum of $550.

The false pretences charged to have been made to Campbell to induce him to pay out his money in February and March, 1900, related to the same business then being carried on by Clancy in the same store. They were of the same general kind as those made to Pickard, and the steps of the cheat from the newspaper advertisement to the resale to Clancy were upon the same model as those by which Pickard had been defrauded.

The transactions with Brasee in March, 1903, were also the sale of a business for an exorbitant price, which Brasee was in-

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duced to pay by false pretences, and its resale upon the discovery by the purchaser that he had been cheated. But this time the business was located at a different place and was represented to be a wholesale meat and produce business carried on by Clancy and Murphy as partners for seven years and in which Murphy before he became a partner had been employed by Clancy. Again the scheme began with a newspaper advertisement beginning this time as follows: "$3000. For sale. Retiring partner's interest in a wholesale and produce business." This time Clancy posed as the retiring partner who had taken Murphy into his employment as a boy. There was a sale of Clancy's interest for $2,000, and a speedy demonstration that the purchaser had been cheated. In this instance the finale varied, Clancy, under compulsion, repaying $2,000 to the purchaser. In this instance the pretence was that the business never had been less than $55,000 a year, and the profit never less than $4,000 a year, and that the sales for the first week of March, 1903, had been $990, for the next week $1,030, and for the third $1,014.

1. The first exception argued upon the defendants' brief is to the refusal of the judge to instruct the jury that the fact that the business while conducted by the purchaser after he took possession did not bring in as much money daily, weekly or monthly as the defendants had stated it did up to the time of the sale was no evidence that the defendants' statement of what it brought in was false.

The judge instructed the jury that it would not follow as a matter of course that the previous sales had not been so much as represented because for the next week or two after the sale they had been less, but allowed the jury to take into consideration the fact that they were less immediately after the sale, upon the question whether the amount of sales previous to the transfer had been represented falsely, saying to them that if the falling off was accounted for or explained by the conduct of the purchaser or any other circumstances they were not to draw any inference that the sales before the transfer were not as represented. We think the request was refused rightly. The whole matter was one to be dealt with by the jury in applying to the question their knowledge and experience. In the usual course of events it is not to be expected that an established business of

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the kind in question will at once seriously diminish without some good cause. Its sale with the good will gives reason to expect that its volume will be at first at least substantially unchanged. Whether it was so in these instances was a question of fact for the jury, and if the volume of business was substantially unchanged it was a fair inference that the representations that it had been very much larger up to the transfer were false.

2. The next exception is to the refusal to give this request. "The defendant's innocence or guilt is to be determined as to each count separately, and in considering the Pickard transaction the jury must not draw inferences as to it from the evidence as to the other transactions. And so as to each of the other transactions."

We are of the opinion that the evidence stated in the bill of exceptions justifies the conclusion that before the false pretences had been made to Pickard the defendants had entered into a general conspiracy to cheat by means of selling out for cash an interest in some business which by false representations they should induce some purchaser to believe to be established and prosperous and to belong to one or both of the defendants and in which one of the defendants should continue to be interested with the purchaser with a view to cheat him further when he should discover that he had been cheated into making his purchase, and that all three of the transactions charged in the indictment were cheats perpetrated by the defendants in the execution of this conspiracy. This aspect of the case was dealt with in the charge and the jury were told that such a conspiracy could be proved by circumstantial evidence, and that upon the question whether such a conspiracy existed they could consider all the evidence in the case. This instruction was right. *Commonwealth* v. *Smith*, 163 Mass. 411, 418. If the jury should find that the defendants had formed and acted throughout in pursuance of such a conspiracy the acts of either or both in any one of the three transactions were relevant, certainly upon the question of the knowledge of each of the falsity of the representations made and of the intention of each to cheat each purchaser by means of them. *Commonwealth* v. *Blood*, 141 Mass. 571. *Commonwealth* v. *White*, 145 Mass. 392, 395. *Commonwealth* v.

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Robinson, 146 Mass. 571, 577. *Commonwealth* v. *Smith*, 163 Mass. 411, 418. *Commonwealth* v. *Lubinsky*, 182 Mass. 142.

The distinction between the present case and that of *Commonwealth* v. *Jackson*, 132 Mass. 16, cited by the defendants, where evidence of other sales was held to have been admitted improperly for the purpose of showing the intent with which the sale charged in the indictment was made, is that there Jackson was acting alone, and the sales were independent transactions, although all were managed similarly. Here there was evidence of a conspiracy and that each of the three transactions were included in its general purpose. For this reason the instruction requested was refused rightly.

3. The remaining exception is to the refusal to give in terms the following request: "The defendant is presumed to be innocent, and all evidence against him must be weighed with this presumption in the minds of the jurors from the beginning of the trial to the moment that the jury concludes, if it does so conclude, that the defendant is guilty."

While not given in terms the substance of the request was given in the charge. The jury were reminded that they had been told over and over again that they ought not to start with the idea that the finding of the indictment or any previous investigation of the case was evidence of guilt. They were told that none of the proceedings prior to the time when the defendants came before them were to be considered in any way as showing guilt, and that "the jury start with the presumption that the defendants are not guilty until the evidence satisfies you differently. But when the evidence . . . satisfies you beyond any reasonable doubt, the evidence introduced by the government and the evidence of the defendants, when you are satisfied on that evidence, that the defendants are guilty, then you should say so, otherwise you say the case is not proved and return a verdict of not guilty."

In their brief the defendants contend that the jurors' mind must be kept open and free from any conclusion until after the jury has heard all the evidence, the arguments and the charge. However that may be it is plain that no such ruling was asked for by the request. We are of opinion that the charge dealt properly with the subject of the presumption in question.

Exceptions overruled.

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THOMAS W. MERRILL, trustee, & another, *vs.* ALONZO F. PRESTON & others.

Suffolk. January 25, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Deed, Construction. *Words*, "Heirs at law."

In the absence of anything expressly indicating a contrary intention, the words "heirs at law" in an instrument of gift indicate those who are such at the time of the death of the ancestor referred to.

By a deed of trust a portion of a fund upon the death of a beneficiary for life was to go to H., "if then living, but if then deceased to his heirs at law." H. died before the beneficiary for life. *Held*, that, there being nothing in the deed to indicate a contrary intention, the heirs at law of H. who were to take upon the death of the beneficiary for life were to be ascertained as of the time of the death of H.

PETITION, filed in the Probate Court for the county of Suffolk on May 25, 1901, for an order of distribution to be made by the first petitioner, Thomas W. Merrill, as trustee under a deed executed by Sarah S. Preston and Horatio W. Preston of a certain fund held for the benefit of Frances Maria Preston during her lifetime, she having died unmarried on October 22, 1898.

The provision of the deed under which distribution was sought was as follows: "and in trust to pay to said Frances Maria Preston the net income ascertained as aforesaid which shall during her lifetime arise or accrue from the remaining ninth part of said trust property semi-annually into her hand or upon her receipt or order therefor signed at or immediately before the payment thereon, and not by way of anticipation and so as not to be liable for or subject to her debts, contracts, engagements or liabilities and at her decease to convey the last mentioned ninth part one third thereof to said Sarah S. Preston if then living, but if then deceased to her heirs at law and the other two thirds thereof to the said Horatio W. Preston, if then living, but if then deceased to his heirs at law."

Horatio W. Preston died on October 13, 1878, leaving no

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issue, his sole heir at law at the time of his death being his mother, Sarah S. Preston, who died on July 15, 1882.

In the Probate Court *McKim*, J. made a decree that the whole fund should be paid to George D. Edmands, surviving executor under the will of Sarah S. Preston. The respondents Alonzo F. Preston, Eliza L. Kendall and Charles E. Stratton, conservator of the property of Sarah A. Harris, appealed.

On appeal the case came on to be heard before *Braley*, J., who at the request of the parties reserved it on the pleadings and agreed facts for determination by the full court.

The case was argued at the bar in January, 1904, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

H. M. Aldrich, for the trustee, stated the case.

E. G. McInnes, for Alonzo F. Preston and Eliza L. Kendall.

F. B. Newton, for Sarah A. Harris.

H. K. Brown, for George D. Edmands, surviving executor under the will of Sarah S. Preston.

HAMMOND, J. The part of the trust deed now presented for interpretation directs the trustee to pay the net income of one ninth of the trust fund to Frances Maria Preston, and at her decease to convey this ninth, "one third thereof to said Sarah S. Preston if then living, but if then deceased to her heirs at law and the other two thirds thereof to the said Horatio W. Preston, if then living, but if then deceased to his heirs at law." The precise question is whether the words "heirs at law," as applicable to the estate of Horatio, are to be determined as of the time of his death, or of the death of the life beneficiary.

It already has been decided by this court that the term "heirs at law" in this deed, so far as applicable to the estate of Horatio, designates those persons who would inherit his land by the general rules of descent, and that under those rules, as well by the law of Maryland, where, at the time of his death he was domiciled, as by the law of Massachusetts, his mother, Sarah S. Preston, who survived him, was his sole heir at law; and that, John A. Preston one of the beneficiaries for life having died, she, as such heir, was entitled to receive the part of the trust fund then payable to the heirs of Horatio. *Merrill* v. *Preston*, 135 Mass. 451. It is to be observed that at the time of that

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decision the mother, who was sole heir at law of Horatio at the time of his death, was still living, and hence the question now before us was not involved in the decision.

The clause in question cannot be taken out of its setting, but must be construed in the light of the general purposes and language of the whole deed. The donors were the widow and only child of Joshua P. Preston, deceased. They each had received from his estate considerable property, and they had "formed the design to make provisions for the benefit of" two of his brothers and three of his sisters; and accordingly this deed was made. Briefly summarized, the deed created a trust fund, to which the widow contributed one third and the son two thirds, the net income of two ninths of which was to go to each of the deceased's brothers and to each of his two sisters Sarah and Eliza, and the income of the remaining one ninth to his sister Frances, during their respective lives. As to the two ninths set apart for the benefit of each brother, it was provided that upon the death of the life beneficiary one half, and if he left no issue surviving then the whole, of it was to go to the donors or their respective heirs at law, in the same proportion as that in which the donors had contributed; but in case there were such issue surviving, then one half should go to such issue and the other half only to the donors. A similar provision was made as to the two ninths set apart for each of the two sisters Sarah and Eliza. As to the one ninth set apart for Frances, the whole was to go at her decease to the donors or their heirs. It is a fair inference from the deed that this change was made in reference to this one ninth because she was unmarried, and, from age or otherwise, not likely to have issue even if she should marry. In this way the donors set aside a certain portion of their property for the support of these brothers and sisters of Joshua P. Preston, intending that at least a part and possibly the whole of it at the respective deaths of the life beneficiaries should revert to them, the donors, if then living, and if not, then to their heirs. Moreover, so far as respected the life beneficiaries, the trust was what commonly is called a spendthrift trust. Neither the interest nor the principal could be reached by their creditors. In a word, a part of the estate of each donor was to be separated from the rest and devoted to this trust, and when the object of the diver-

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sion should be accomplished it was to be returned to their heirs at law. The central idea of the scheme had reference, not to a classification of the property of the donors, nor of their heirs, but to the pecuniary benefit of certain relations of the deceased husband and father.

Coming now to the special language of the deed, we find that the deed is well drawn; and it is evident that the minds of the donors were directed many times to the question whether at the various times of the distribution of parts of the principal of the fund the distribution should be made to a whole class or only to the survivors of the class. For instance, as to the two ninths set apart for the benefit of each of the two brothers, the deed provides that at the decease of either brother the trustee shall divide one half of said two ninths, being one ninth, "into as many equal shares as there shall be children of him, then living or deceased leaving issue then living," and shall "apportion and convey one of said shares to each of said children then living, and one to the child or children then living of each deceased child aforesaid equally to be divided between them if more than one." So far the minds of the donors have been fixed upon the one ninth which shall go to the issue of the beneficiary, and the conclusion reached is that the principal of that one ninth shall go not as a vested interest to the whole issue of the life beneficiary, but as a contingent interest only to those who may be living at the time of his death. And all this is expressed clearly in apt language. With this thought fresh in their mind, the donors proceed to the directions for the other one ninth. As to this (and as to the first one ninth if the life beneficiary leaves no issue surviving him) the trustee is to convey one third part to the donor, Sarah, if then living, but if then deceased, to her heirs at law, and two thirds to Horatio, if then living, but if then deceased, to his heirs at law. The same question which had arisen as to the issue of the life beneficiary, namely, as to whether the distribution of the one ninth should be confined to those living at the time of the distribution, arose in substance when the donors came to designate what heirs of Horatio should take in case he should not be living at the time of distribution. In the case of the issue, they only were to take who were living at the time of the distribution. In the case of the heirs at law

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of the respective donors, no such limitation is expressed. The sharp contrast between the two clauses in this respect is significant, and is entitled to much weight. It seems to us highly improbable that if the intention was that the term "heirs at law" should mean only those surviving at the time of the distribution, the donors whose minds had just been sharply drawn to the expression of a similar intention with reference to the issue of a life beneficiary, and had clearly expressed it, should have failed to express the intention in language equally clear, especially when it is considered that the general rule is that the term "heirs at law" designates those who are such at the time of the death of the ancestor. The same remarks are applicable to similar language used in that part of the deed which makes provision for the two sisters Sarah and Eliza. The language with reference to the one ninth set apart for Frances is different, it is true, in that it contains no provision for distribution among her issue, but, as before remarked, it is fair to infer that this difference in language was due to the expectation that she would leave no issue. And in any event it is not reasonable to suppose that the term "heirs at law" was used in any different sense in this part of the deed than in the part relating to her brothers and sisters.

In view of the predominant central purpose of the donors in creating this fund as expressed in the deed, the sharp contrast between the language designating the issue of a beneficiary who are to take at a time of distribution and that designating the heirs of the donors who are to take at such a time, and of the general principle of interpretation that in the absence of anything to the contrary the term "heirs at law" designates those who are such at the time of the death of the ancestor, and of the absence of anything expressly leading to a contrary interpretation, a majority of the court are of opinion that in the clause relating to the distribution of the one ninth set apart for Frances, which is the only clause now before us, the heirs at law of Horatio are to be determined as of the time of his death. The case is clearly distinguishable from *Wason* v. *Ranney*, 167 Mass. 159, upon which the respondents rely. For cases in our own reports bearing upon the general rule as to the meaning of the term "heirs at law," see *Childs* v. *Russell*, 11 Met. 16;

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Abbott v. *Bradstreet*, 3 Allen, 587, and cases therein cited; *Heard* v. *Read*, 169 Mass. 216, and cases therein cited; *Rotch* v. *Rotch*, 173 Mass. 125.

The result is that the petitioner Edmands, the sole surviving executor of the will of Sarah S. Preston who was the sole heir at law of her son Horatio at the time of his decease, is entitled to receive as such executor the part payable to the heirs of Horatio. The decree of the Probate Court was correct.

Decree affirmed.

JOSEPH RADOVSKY *vs.* ABRAHAM SPERLING & another.

Bristol. October 25, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Poor Debtor.

If a poor debtor, who is charged with fraud under R. L. c. 168, § 17, cl. 2, and who has entered into a recognizance for his appearance for examination, voluntarily makes default by failing to appear at the time and place appointed for the hearing, under §§ 52 and 55 of the same chapter he has forfeited the benefit of the proceedings under the provisions of the chapter, and there is a breach of his recognizance.

CONTRACT on a poor debtor's recognizance against Abraham Sperling as principal and Israel Ziman as surety. Writ in the Second District Court of Bristol dated December 14, 1903.

On appeal to the Superior Court the case was tried before *Aiken*, J., without a jury. At the close of the evidence, the substance of which is stated in the opinion, the plaintiff asked the judge to make the following rulings: 1. Upon all the evidence the plaintiff is entitled to recover. 2. After the defendant's default on December 2, and after the refusal to him of the oath, the defendant, Sperling, was not entitled to the benefit of any of the provisions under R. L. c. 168. 3. After the judgment debtor had delivered himself up for examination before the judge of the Second District Court of Fall River the judge of the Third District Court in New Bedford had no jurisdiction in the matter.

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The judge refused to rule as requested, and found for the defendants. The plaintiff alleged exceptions.

D. R. Radovsky, for the plaintiff.

F. Wasserman, for the defendants.

HAMMOND, J. This is an action on a poor debtor's recognizance. From the record of the Second District Court of Bristol it appears that charges under the first and second clauses of R. L. c. 168, § 17, were filed by a judgment creditor against the defendant Sperling, the judgment debtor; that after a hearing thereon a certificate for his arrest upon the execution was issued; that on November 12, 1903, Sperling was arrested and brought before the court, and that on the same day he with one Ziman, the other defendant in this case, as his surety entered into the recognizance; that on November 27, Sperling filed in the same court an application for leave to take the oath for the relief of poor debtors, and on the same day notice thereof was issued to the judgment creditor to appear at that court on December 1, and examine the debtor. The record continues as follows: "On this December 1st, 1903, the debtor appeared and after being duly sworn was partially examined. The hearing was then continued to December 1st, 1903, at two o'clock P. M., at the court rooms of the Second District Court. Then the hearing was adjourned until December 2, 1903, at nine o'clock A. M., at the court rooms of the Second District Court. Then the judgment debtor, Sperling, was defaulted and the oath for the relief of poor debtors was refused."

The evidence offered by the defendants tended to show that on December 5 Sperling applied to the Third District Court of Bristol, to take the oath for the relief of poor debtors, and that on December 15, the creditor although duly notified not being present, the oath was administered by a judge of that court to Sperling, and he was discharged from arrest, the judge making the proper certificate thereof.

It is contended by the defendants that, after Sperling had been defaulted in the first court to which he applied, that court had no jurisdiction to proceed further in the matter, and that the order refusing the oath was *coram non judice*, and therefore that the provision in R. L. c. 168, § 35, that if the oath has been refused another application to take it "shall not be made by the

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defendant or debtor within seven days from the hour of such refusal," is not applicable. We have not found it necessary, however, to consider this question because we are of opinion that, even if this contention be correct, still the plaintiff is entitled to recover upon a ground to which this is in no sense material.

It is to be borne in mind that the affidavit of the creditor contained two charges, the second being one of fraud in accordance with the second clause of R. L. c. 168, § 17. While this charge is very general, and, before pleading, the debtor might be entitled to have specifications filed, if he seasonably requested, (*Stockwell* v. *Silloway*, 100 Mass. 287, *Frost's case*, 127 Mass. 550, 554,) yet in the absence of such a request, or where the charge can be made specific by its reference to the action or otherwise, the charge may be regarded as sufficiently definite for the purpose of the examination thereon. *Noyes* v. *Manning*, 162 Mass. 14. The record of the first court to which the debtor applied does not recite that he had pleaded formally to this charge of fraud, but the hearing was upon both charges, the second as well as the first, and the debtor defaulted at a time appointed for the hearing. The case is therefore within R. L. c. 168, § 55, which, when read in connection with §§ 17 and 52 of the same chapter, provides in substance that when such a charge is made or filed on affidavit for arrest or pending the examination of the debtor, "if the debtor voluntarily makes default at a time appointed for the hearing, . . . he shall have no benefit from the proceedings under the provisions of this chapter" except as stated in another part of the same section, which is not material to this case. It follows that the second court to which the debtor applied had no jurisdiction, and there was a breach of the recognizance, and the first ruling requested by the plaintiff should have been given.

Exceptions sustained.

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FRANCIS O. HOFFMAN, individually and as administrator, & another, *vs.* NEW ENGLAND TRUST COMPANY, trustee, & another.

Essex. November 2, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Trust, Termination.

A testator directed that certain municipal and railroad bonds named, if owned by him at the time of his death, should be set apart by his executor to provide for the payment of a certain income to each of two nieces named so far as necessary for that purpose, and that all the other bonds which he should own at the time of his death should be held by a certain trust company, as trustee, until the death of the two nieces above referred to, that the interest therefrom should be paid to his executor for distribution to the persons entitled to receive it under his will, and that on the death of both of the nieces, the bonds might be sold and distributed with all accumulations to the persons entitled to the residue of his personal estate. While the nieces still were living, three out of four of the persons entitled to the residue of the testator's personal estate, all being of age, filed a bill in equity praying for the termination of the trust. The fourth beneficiary and the trustee opposed the termination of the trust before the death of the nieces. *Held*, that, even if this court ever would terminate such a trust against the objection of one of the beneficiaries, there was no reason for doing so in this case, it being plainly the intention of the testator that the trust should continue until the death of both of his nieces, the provision to that end being lawful, and nothing having happened which the testator did not anticipate.

BILL IN EQUITY, filed February 18, 1904, by Francis Otey Hoffman, individually and as the administrator of the estate of C. Peirce Hoffman, and Helen E. Kilham, being with Lucretia O. S. Johnson who was joined as a defendant all of the residuary legatees under the will and codicils of Nathan Peirce of Salem, and each being over twenty-one years of age, praying for the distribution of a certain trust fund held by the defendant trust company under the will of Nathan Peirce, consisting of certain bonds owned by the testator at the time of his death and the invested proceeds of such of the bonds as had matured.

The case was heard by *Lathrop*, J., who made a decree dismissing the bill. The plaintiffs appealed.

J. E. Young, for the plaintiffs.

B. D. Barker, for the defendant trust company.

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HAMMOND, J. In the original will the only provision relating to the bonds was that contained at the end of the seventh item, as follows: "And I direct that any Bonds owned by me shall not be collected or sold until they become due and payable."

In the first codicil the only provision as to the bonds is the following: "And I modify my said Will in relation to the Bonds that I may own at my decease, as follows — I now hereby direct that the Bonds of the City of Cambridge — the Bonds of the City of Providence — the Bonds of the City of Springfield — and the Six per Cent Bonds of the Boston and Albany Railroad Company, be set apart by my Executor, to meet the income of One third of my Personal Estate, held in trust for Mary Louisa Peirce and also for the One fifth income of the remaining two thirds of my personal estate held in trust for Laura C. G. Peirce, so far as may be necessary for that purpose. And all the other Bonds that I may own at my decease are to be held by my Trustee, the New England Trust Company until the decease of my Nieces, Mary L. Peirce and Laura C. G. Peirce, the interest on the same, to be paid to my said Executor, for distribution to the parties entitled to receive the same by said Will. And at the death of both the said Mary Louisa Peirce and Laura C. G. Peirce, the said Bonds may be sold and distributed with all accumulations, although not then due, to the parties entitled by my said Will to the residue of my Personal Estate."

In the second codicil there is no mention of the bonds; and it is suggested by the petitioners that since the only provision in the original will concerning the bonds was at the end of the seventh item, the substituted provision contained in the first codicil must be regarded also as a part of the seventh item as thus modified, and further, that, since the second codicil modifies the seventh item and says nothing about the bonds, the provisions of the first codicil in relation to the bonds are by necessary implication annulled by the second codicil. But we do not so read the will. The manifest purpose of the second codicil was not to change the provisions of the first codicil as to the bonds, but to change the provisions of the will as to the persons to whom the estate named in the seventh item should go. The provisions of the first codicil as to the care of the bonds by a

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trustee and the time when they shall be sold and distributed among the residuary legatees must be regarded as still standing.

The main question is whether the trust should be terminated. It is to be observed that the petitioners comprise only three of the beneficiaries, the fourth beneficiary and the trustee appearing in opposition; and, under such circumstances, to declare the trust terminated would be going further than this court has gone.

But there are other grounds for refusing the petition. Plainly the testator intended that the trust should continue until the death of both of his nieces Mary and Laura. And, whatever may be the law elsewhere, that provision in this Commonwealth is legal. *Claflin* v. *Claflin*, 149 Mass. 19. It is also plain that nothing has happened which the testator did not anticipate, and for which he has not made provision. The language used by Field, J. in the case above cited is applicable here: "It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own."

For reasons stated in that case and in *Young* v. *Snow*, 167 Mass. 287, with reference to the general doctrine of the termination of such a trust, which it is unnecessary to repeat here, no sufficient reason is shown for the termination of the trust.

Petition dismissed.

HENRY R. MOORE & others *vs.* ALEXANDER W. DICK.

Essex. November 3, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Equity Pleading and Practice, Master's report. *Mortgage*, Of real estate, foreclosure. *Equity Jurisdiction*, Laches.

Where the rule to a master directs him "to hear the parties and their evidence and report his findings of fact and law to the court," he is not bound to report the evidence, and if one of the parties wishes to compel him to do so, that party must move in court that the master be required to report the whole evidence or such part of it as is desired. Such a motion properly should be made before the hearing before the master is closed, and when made after the hearing has been

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closed and a draft of the master's report has been shown, such a motion by the losing party is not looked upon with favor.

An advertisement of a sale of real estate under a power of sale in a mortgage, which, instead of being published in a certain weekly newspaper named in the power of sale, is published in a daily newspaper of another name printed by the same proprietors and issued from the same office, is not published in compliance with the requirements of the power, and an attempted foreclosure sale in pursuance of such an advertisement is void.

Where a mortgagee of real estate has made an attempted foreclosure under a power of sale in the mortgage, which is void because the sale was not advertised in accordance with the terms of the power, and the mortgagee takes possession of the land and continues in possession in good faith supposing the sale to have been valid, the mortgagor, who never has been deprived of the legal title to the land, may maintain a bill in equity to redeem it from the mortgage at any time within twenty years, and no delay on his part within the period of limitation can be accounted laches.

BILL IN EQUITY, filed July 14, 1902, by the children and heirs at law of Henry Moore, deceased, to redeem certain land in Lynn from two mortgages made by Henry Moore in his lifetime.

In the Superior Court the case was referred to Henry Wardwell, Esquire, as master, by an order quoted in the opinion. The master found for the plaintiffs, and refused the defendant's requests in regard to reporting the evidence as stated in the opinion. *Stevens*, J. denied a motion of the defendant to order the master to report the evidence, the defendant appealing from this order, as stated in the opinion. The judge then heard the case upon the master's report and the defendant's objections and exceptions thereto, and made the following decree: "that the exceptions to the master's report be and the same are hereby overruled; the master's report is confirmed and it is further adjudged that the plaintiffs have a right to redeem and that they may redeem the real estate described in the plaintiffs' bill upon the payment to the defendant of the sum of $2,453.44, being the amount found to be due to the defendant by the master, within sixty days from the entry of this decree and the further payment of interest on said amount from October 29, 1903, to the date of payment, at six per cent per annum; and upon the payment of such sum the defendant shall execute and deliver to the plaintiffs a deed, conveying to them all right, title and interest in said real estate which he acquired under and by virtue of the deed from James Pool, said deed being dated December 18, 1892, and being recorded in Essex South District Registry of

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Deeds, Book 1342, Folio 589, free and clear from any and all incumbrances placed thereon by said Dick, whether by way of purchase money, mortgage or otherwise; and the defendant shall further execute and deliver to the plaintiffs an assignment of all right, title or interest that he may have in and to the said real estate under the two mortgages from Henry Moore to Philemon R. Russell, dated respectively October 10, 1873, and November 1, 1873, and recorded in the Essex South District Registry of Deeds, on October 16, 1873, and November 6, 1873, respectively."

The defendant appealed.

G. L. Mayberry & W. M. Morgan, for the defendant.

W. H. Niles, F. D. Allen & W. L. Van Kleeck, for the plaintiffs.

HAMMOND, J. This is a bill to redeem land from two mortgages given by Henry Moore, the father of the plaintiffs. The bill is resisted upon two grounds, the first of which is that the first mortgage has been duly foreclosed by sale under the power therein contained, and the second that if the foreclosure was imperfect by reason of any defect in the proceedings the plaintiffs are barred by laches.

After the hearing before the master had closed and a draft of the report had been shown, the defendant requested the master to annex to the report a copy of the evidence bearing upon several findings. The master refused to comply with such requests, and the defendant duly excepted. Subsequently the defendant moved that the judge order the master to report all the material evidence bearing upon his exceptions, alleging that the judge could not properly dispose of them without such a report. The motion was overruled, and the defendant appealed.

The rule to the master directed him "to hear the parties and their evidence and report his findings of fact and law to the court." Under this rule he was not bound to report the evidence. It was open to either party during the hearing before him to move in court that he be required to report the whole testimony or any part of it, if, in the progress of the hearing, either party considered that such a course was necessary or desirable. This was not done. "For the losing party to come in, for the first time, after the hearing before the master is closed and his draft report is known, and ask for a report of the evidence, is a

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proceeding never looked upon with favor," (*Parker* v. *Nickerson*, 137 Mass. 487, 493,) and we are not satisfied, from an examination of this report, or from anything before us, that justice requires that the exceptions so far as based upon the refusal of the master to comply with these requests should be sustained, or that the motion made to the judge about the same matter should have been granted. We proceed therefore with the examination of the case as presented by the master's report.

The validity of the foreclosure proceedings taken in 1883 by one Fairchild, then the holder of both mortgages, is attacked solely upon the ground that the notice of sale was not inserted in the paper designated in the power. As to this the master finds as follows: "The power of sale in the first mortgage provides that the notice of sale shall be published in 'the Reporter Newspaper printed in the County of Essex aforesaid.' At the date of this mortgage, October 10, 1873, there was published in Lynn a newspaper which had as its name at the top of the first page, 'Lynn Semi-Weekly Reporter.' This paper had been published in Lynn since 1854. Its publication was continued till 1880, when it passed into the hands of new owners, who then began the publication from the same office of two newspapers, a daily whose title was the 'Lynn Daily Bee,' and a weekly entitled 'The Lynn Reporter.' They continued to publish the latter under the same name till 1889.

"Neither in 1873 nor in 1883, was there any other newspaper printed in the County of Essex whose name contained the word 'Reporter.'

"Both the 'Lynn Semi-Weekly Reporter' and 'The Lynn Reporter,' during the whole of their existence were commonly known in Lynn by the name of 'The Reporter.' In 1873 it was what is ordinarily spoken of as a family paper and was the leading paper of that kind in Lynn. It had a good circulation, with many regular subscribers. It contained a summary of the news, with stories and other matters of literary interest, and was in common use for advertising legal notices. It was taken regularly, and read, by the plaintiffs and their father during its whole existence from 1854 to 1889, and was sent to those of the plaintiffs who were away from Lynn. The publication of a daily paper by the same owners after 1880 had the tendency to

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diminish the circulation of the weekly. This effect was not at once very great, but increased gradually till in 1889 it was such that the publication then was stopped.

"I find that 'The Lynn Reporter' was substantially a continuation of the 'Lynn Semi-Weekly Reporter,' and that they both answered the description of 'The Reporter Newspaper printed in the County of Essex.' The 'Lynn Daily Bee,' or the 'Lynn Bee,' as it is called in the Fairchild's affidavit, was in no sense 'The Reporter Newspaper' mentioned in the power. The newspaper designated in the power of sale I find was 'Lynn Semi-Weekly Reporter,' commonly known as 'The Reporter.' I find that this was the newspaper the mortgagor and mortgagee had in mind when the mortgage was given.

"It is probable that if the notice had been published in the Reporter the plaintiffs would have known of the sale. The publication of the notice of sale in the 'Lynn Bee,' was not such a publication as was required by the terms of the power of sale. A publication in the Lynn Reporter would have been so.

"I find therefore that in this respect Fairchild, the assignee of the mortgage, did not comply with the conditions annexed to the power of sale in the mortgage. It did not appear that there was a failure to comply with the terms of the power in any other respect than that above mentioned."

The question is a narrow one and not free from difficulty, but after a careful consideration of the circumstances, which are somewhat minutely detailed in the report, we are of opinion that they justify the general finding that the newspaper designated in the power of sale was the "Lynn Semi-Weekly Reporter," commonly known as the "Reporter," and that its identity under a change of name was substantially continued in the "Lynn Reporter" and not in the "Lynn Daily Bee." It is plain that the weekly paper in its general character, and presumably in the kind of its patronage, much more nearly resembled the one named in the power than the daily did. The finding of the master upon this matter therefore must stand.

It is familiar law that one who sells under a power must follow strictly its terms. If he fails to do so there is no valid execution of the power and the sale is wholly void. *Bigler* v. *Waller*, 14 Wall. 297. *Shillaber* v. *Robinson*, 97 U. S. 68. *Roarty* v. *Mitch-*

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ell, 7 Gray, 243. *Thornburg* v. *Jones*, 36 Mo. 514. In *Smith* v. *Provin*, 4 Allen, 516, where the power required that an affidavit of the proceedings should be made and recorded in the registry of deeds within one year after the sale, the same principle was recognized and applied, and, it appearing that no such affidavit had been made and filed for record until nearly three years had expired, the sale was treated as a nullity. The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power. It follows that the sale was not valid. The case stands as though there had been no attempt to foreclose, and the right of redemption is still outstanding.

It is strongly urged by the defendant that the plaintiffs are barred by laches. It is said that they knew or ought to have known of these foreclosure proceedings, and that they have slept on their rights so long that they have no claim in equity to relief. But this idea is founded upon a misconception of the case. There is here no question of laches. This is not a case where there has been a literal compliance with the power so that the legal title to the land passed to the purchaser, but for some reason as, for instance, a failure to act with due fidelity to the trust imposed by the power, there are equitable reasons why the sale should be set aside. In such a case the sale, being in law valid, is voidable only in equity, and the owner of the right to redeem must apply for relief in equity within a reasonable time. In the present case there has been no valid sale in law, and the title to the land subject to the mortgages has not passed from the plaintiffs. They are still the owners of the fee. They come into court with a legal right to redeem, a right which never has been impaired by foreclosure proceedings either under the power, or by a formal entry for possession. This right to redeem may be enforced by a bill in equity, and mere delay, provided it does not extend beyond the statute of limitations, is no bar, and that is so whether or not anything is paid upon the mortgage debt. *Ayres* v. *Waite*, 10 Cush. 72. A purchaser under a power of sale must see to it at his peril that there has been a compliance with the legal and essential terms of the power. If there has not been, then he is not protected whether acting in good faith or not. In

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the present case the record disclosed through the mortgage the name of the newspaper in which the notice was to appear.

The right to redeem is not barred until after the mortgagee has held possession adversely for at least twenty years. *Ayres* v. *Waite*, *ubi supra*. No such adverse possession appears prior to the foreclosure proceedings in 1883, and the bill was filed July 14, 1902. The conclusion to which we have come upon these questions makes it unnecessary to consider further in detail the defendant's exceptions to the report. The plaintiffs have the right to redeem.

We see no reasonable objection to the final decree. It does not appear that the defendant has made any attempt to convey any portion of the property, and in the absence of any such act on his part, and in view of the description of the land contained in the deed from Pool to him, the decree, so far as respects the form of the conveyances, seems to meet the precise features of the case more effectually than if it provided simply that the defendant should execute a discharge in the ordinary form; and under the facts disclosed we do not see that it places the defendant in any worse position.

Decree affirmed.

MORRIS L. COLE *vs.* HENRY M. KILLAM.

Essex. November 3, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Contract, Performance and breach. *Conditions*, Concurrent. *Equity Jurisdiction*, Specific performance.

In a suit in equity to enforce the specific performance of a contract by which the defendant agreed to sell certain land to the plaintiff for the sum of $50 per acre at any time before the expiration of a certain lease, the conditions of the contract being concurrent the plaintiff need not prove a tender of the purchase money. It is sufficient for him to show that he notified the defendant that he would take the land and pay the price, and was ready and able and offered to do so, and that the defendant refused to convey the land and did not intend to keep his agreement. A request by the plaintiff that the defendant should have a survey of the land made, this being necessary to determine how much should be paid, does not excuse the defendant's refusal to convey, especially if he did not base his refusal on that ground.

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BILL IN EQUITY, filed July 3, 1902, to enforce the specific performance of a contract to convey to the plaintiff a certain parcel of land in Boxford.

The bill alleged, that on April 10, 1897, the plaintiff leased from the defendant a certain parcel of land in Boxford, which was known as "The Plain," for the term of five years from the date of the lease, that the plaintiff occupied the premises during the term of the lease and performed all things which by the terms of the lease he was bound to perform, and before the expiration of the lease notified the defendant that he would purchase the land described in the lease in accordance with the privilege given to him therein, that the exact amount of land in the parcel was not known either to the plaintiff or the defendant, but before the expiration of the lease the plaintiff offered to the defendant the purchase price of the land at the rate of $50 per acre according to the best estimation of the quantity of land which he could make and further offered to make good to the defendant any deficiency in the purchase price at the rate aforesaid if upon a survey of the premises it appeared that he had not paid sufficient money, that the defendant refused to accept the tender and refused to convey the premises to the plaintiff or to give him a deed thereof, and that upon the expiration of the lease the defendant re-entered the premises and at the time of the filing of the bill still held possession of them, praying that the defendant might be ordered specifically to perform the agreement contained in the lease and that upon payment by the plaintiff to him of the amount due at the rate of $50 per acre the defendant might be ordered to execute and deliver to the plaintiff a good and sufficient deed of the premises.

The defendant demurred to the bill. In the Superior Court *Holmes*, J. overruled the demurrer, and the defendant appealed.

Thereupon the case proceeded to trial. It appeared, that the defendant leased to the plaintiff the real estate in Boxford on April 10, 1897, for the term of five years as alleged in the bill, and that in the lease was contained the following agreement: "And I, the said Henry M. Killam, agree to sell all of said land except the following described parcels to the said Cole for the sum of fifty dollars per acre at any time prior to the expiration of this lease."

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The judge made the following memorandum of findings:

"I think the plaintiff is entitled to a decree that the defendant specifically perform his contract to convey the land. No question was made at the hearing before me but that the land which the defendant agreed in the lease to sell the plaintiff could be ascertained from its description in the lease, and the price of the land was to be $50 per acre, and that a survey was necessary to determine its area.

"The plaintiff before the lease expired notified the defendant that he would take the land and pay the price and I find that he was ready and able and offered to do so, and I find that the defendant did not intend to convey or keep his agreement. The plaintiff did ask the defendant to have a survey made which was necessary to determine how much should be paid, but the defendant did not put his refusal to convey on the ground that the survey was requested. It is true that at the trial he contended he was not required to make the survey and that the plaintiff by attaching that condition excused the defendant from conveying, but that was clearly an afterthought and not relied upon when the plaintiff offered to pay."

The judge ordered that, upon the quantity of land being ascertained, the plaintiff on paying the price should be entitled to a conveyance. The premises having been surveyed, it was agreed by the parties that the amount of land was six and six one hundredths acres. At the request of the defendant the judge reported the case for determination by the full court. If the order overruling the defendant's demurrer was right and the judge was warranted on the evidence in finding for the plaintiff, a decree was to be entered for the plaintiff with costs; otherwise, the finding was to be set aside and such decree was to be entered as law and justice might require.

J. F. Batchelder, for the defendant.

W. S. Peters & H. J. Cole, for the plaintiff.

HAMMOND, J. The defence is that the plaintiff made no tender of the purchase price. It is true that no formal tender was made, but it was unnecessary. In a case like this, where the stipulations are that the one shall pay the money and the other shall execute a conveyance, and there is no provision that either is to be done first, the covenants are mutual and depend-

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ent. The one is not bound to pay without receiving his deed, nor the other to part with his land without receiving his money. The performance must be simultaneous. It is not necessary on the part of the purchaser to make a strict tender. It is sufficient that when the time comes for the transaction he is able and prepared to pay, and demands the deed. That is sufficient tender of performance. *Irvin* v. *Gregory*, 13 Gray, 215.

The judge has found that before the expiration of the lease the plaintiff notified the defendant that "he would take the land and pay the price, and . . . was ready and able and offered to do so." The plaintiff's evidence tended to show also that the defendant refused to give the deed, and the judge found that he "did not intend to convey or keep his agreement." The evidence fully justifies these findings.

As to the contention of the defendant that the plaintiff asked him to have a survey made of the land, it is enough to say that the judge has found that such a survey was necessary to determine the price to be paid, and that the defendant did not put his refusal to convey on the ground that the survey was requested, nor did he rely upon it as a ground for refusal at the time the plaintiff offered to pay. The evidence at the trial showed a case for the plaintiff.

The defendant demurred to the bill upon the ground that it did not appear therein "that the plaintiff ever tendered, before the expiration of the term of the lease, to the defendant, the purchase price." For the reasons above given the demurrer was overruled rightly.

In accordance with the terms of the report there must be a

Decree for the plaintiff.

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RANDOLPH A. ROGERS *vs.* BOSTON AND MAINE RAILROAD.

Essex. November 3, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Negligence, Contributory.

An employee of a coal company, driving a pair of horses in an empty tip cart on his way for a load of coal on a private road used by the coal company's agents, servants and customers, about to cross the tracks of a railroad company at a crossing which he considers dangerous, knowing that a train may come along at any moment and that there is no gate or flagman there, his view in one direction being obstructed by a lumber shed and by a car on a spur track and his empty cart making considerable noise on the frozen ground although going slowly, is not in the exercise of due care if he drives upon the track and is struck by a train without first stopping to ascertain whether he can cross with safety.

TORT for personal injuries from being run down by a train of the defendant while crossing the tracks of the defendant's railroad in that part of Haverhill formerly called Bradford. Writ dated March 4, 1902.

In the Superior Court *De Courcy*, J., at the close of the plaintiff's evidence, ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. S. Peters & H. J. Cole, for the plaintiff.

H. F. Hurlburt & D. E. Hall, for the defendant.

LATHROP, J. Taking the evidence most favorably for the plaintiff, the following facts appear. The defendant had three tracks at the place of the accident. One of them was its main track, and on each side of this was a spur track put in for the benefit of a coal and lumber company, which occupied the land on each side of the tracks. The spaces between the tracks were planked in accordance with an agreement made by the predecessor in title of the defendant, and the planking was maintained for the benefit of the coal and lumber company. The tracks ran in an easterly and westerly direction. On the north of the land of the company was the Merrimack River. The way in question crossed the tracks at nearly a right angle, and was used by the company to obtain access to its coal sheds.

The plaintiff was twenty-nine years old and had been in the

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employ of the coal and lumber company for three months. He was familiar with the surroundings. He knew that passenger trains and freight trains passed on the main track, and that a train might come along at any moment. He knew, also, that there was no gate or flagman at the crossing, and testified that it was a dangerous crossing; and he knew that he was taking some chances in using it.

To one approaching the tracks from the south, as the plaintiff was doing just before the accident, the view towards the west was obstructed by a lumber shed and by a car on the southerly spur track near the crossing. The plaintiff was on an empty tip cart drawn by two horses, and was on his way to the coal sheds on the northerly side of the tracks, to get a load of coal. He testified that as he approached the crossing his horses were walking at a pretty good gait, but as he got nearer he pulled up his horses a little, so that they were walking about a mile an hour, and when his horses' heads were about at the southerly corner of the lumber sheds he pulled up his cap, which had been drawn over his ears, listened and looked, but heard and saw nothing; that he kept looking but could not see anything until he got upon the track where he was struck. He also testified that unless there was some noise in the yard to drown the sound of trains one could hear them; that on that morning the ground was frozen, and his empty cart made considerable noise as he went along; and that there was noise also in the yard.

The only evidence as to the speed of the train came from a witness for the plaintiff, who, on direct examination, testified that the train, which consisted of a flat car loaded with lumber, pushed by a locomotive engine, was going at the rate of thirty miles an hour; but who, on cross-examination, testified that he "was entirely wrong when he estimated the speed of the train at thirty miles an hour"; that the train was going three or four times as fast as the plaintiff, and at its usual rate at that place. The accident occurred about a quarter to ten o'clock in the morning of a pleasant day in January, 1902.

On this evidence, we are of opinion that the ruling was right. This was not a highway, town way or travelled place, where a railway corporation is required to cause a bell to be rung or a whistle to be sounded, under the R. L. c. 111, §§ 188–192. It

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was a private way, restricted to the use of the coal and lumber company, its agents and servants, and its customers.

In the next place we are of opinion that the plaintiff was not in the exercise of due care. The general rule in this Commonwealth is that, as a railroad crossing is a dangerous place, a traveller on the highway is bound to make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to danger; that if he fails to use his senses without reasonable excuse, he fails to use reasonable care; and that the burden is on the plaintiff to show such care, even though the defendant is in fault. *Chase* v. *Maine Central Railroad*, 167 Mass. 383, 387, and cases cited. So, also, it is the general rule that if there is anything to obstruct the view of a traveller on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety. *Chase* v. *Maine Central Railroad*, 167 Mass. 383, 388. *Fletcher* v. *Fitchburg Railroad*, 149 Mass. 127, 133. *Donnelly* v. *Boston & Maine Railroad*, 151 Mass. 210. *Debbins* v. *Old Colony Railroad*, 154 Mass. 402.

We see nothing in the case before us to take it out of the general rule. The plaintiff certainly had no greater rights than a traveller on the highway. While there is evidence that he looked and listened, neither was of any avail. His view was obstructed, and the noise of his cart prevented his hearing the approaching train, and this he knew. It was his duty then to stop and listen. If he had done this, there can be no doubt that he would have heard the approaching train. He took his chances, and must abide the consequences.

Exceptions overruled.

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OLIVE UPHAM *vs.* CITY OF BOSTON.

Suffolk. November 10, 11, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Way, Defect in highway.

A circular hole in the surface of a sidewalk from two to two and five eighths inches in diameter caused by the absence of one of the glass disks of a Hyatt light set in the sidewalk can be found to be a defect in the highway. Whether a hole so small that it could endanger no travellers except those using crutches could be found to be a defect in a highway, *quære*.

TORT for personal injuries alleged to have been caused by a defect in Union Park Street, a highway of the defendant. Writ dated February 9, 1901.

At the trial in the Superior Court before *Bell*, J., the jury returned a verdict for the plaintiff in the sum of $800; and the defendant alleged exceptions.

A. L. Spring, for the defendant.

E. R. Anderson, for the plaintiff.

BARKER, J. The plaintiff while walking with crutches on the sidewalk of Union Park Street in Boston was thrown down and hurt because the end of one of her crutches went down into a circular opening in the surface of the sidewalk caused by the absence of a glass disk in a Hyatt light. The hole was from two to two and five eighths inches in diameter. The crutch went down into the hole about two feet. Several of these glass disks were out at the time of the accident. The judge left to the jury the question whether the hole was a defect. The defendant excepted to a refusal to rule that the evidence did not disclose any defect. The only question raised by the defendant in this court is whether we shall decide as matter of law that such a circular opening in the surface of a sidewalk is not a defect.

We have no doubt of our power to hold that a certain condition of things in a way is not as matter of law a defect. See *Burke* v. *Haverhill*, *ante*, 65. Nor do we express any opinion upon the question whether a hole so small that it could endanger no travellers except those using crutches might be a defect.

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We think it plain that the toe or the heel of many travellers without crutches might be caught in a circular opening two and five eighths inches in diameter, and cause injury.

Exceptions overruled.

COMMONWEALTH *vs.* FRANCIS B. CROWNINSHIELD.

Suffolk. November 14, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Boston Park Commissioners. Parks and Parkways. Automobile. Words, "Drive."

Under St. 1893, c. 300, § 1, the Boston park commissioners lawfully could take as a parkway Commonwealth Avenue in that city, from Arlington Street, where it begins, to its intersection with Beacon Street, with the consent of the public authorities having control of that avenue and with the consent in writing of the owners of a majority of the frontage of the lots abutting thereon, to connect it with the public park or driveway under their control called the Back Bay Fens, although having no control over the Public Garden which abuts on Arlington Street.

Under St. 1875, c. 185, § 3, and St. 1893, c. 300, § 8, the Boston park commissioners have power to make rules for the use and government of the parkways under their control, and a rule made by them that "no person shall ride or drive in Commonwealth Avenue at a rate of speed exceeding eight miles an hour" is valid, being authorized by statute and reasonable.

St. 1902, c. 315, § 1, regulating the speed of automobiles throughout the Commonwealth, repealed by St. 1903, c. 473, § 15, and superseded by § 8 of the same statute, did not abrogate any park regulations or deprive any park commissioners of powers conferred by previous statutes to regulate the speed of vehicles on parkways, referring only to public highways, streets and ways, and § 8 of the superseding statute referring only to public ways or private ways, excluding parkways.

The provision of St. 1903, c. 473, § 14, that no special regulation as to the speed of automobiles "shall be effective unless notice of the same is posted conspicuously at the points where any road affected thereby joins other roads," applies only to regulations made by boards of aldermen of cities or the selectmen of towns, and has no application to rules made by park commissioners.

One who is controlling the motive power of an automobile may be said to be driving it within the meaning of a rule, made by a board of park commissioners, that no person shall "ride or drive" in a certain parkway at a rate of speed exceeding eight miles an hour.

COMPLAINT, received and sworn to in the Municipal Court of the City of Boston on December 1, 1903, charging the defendant

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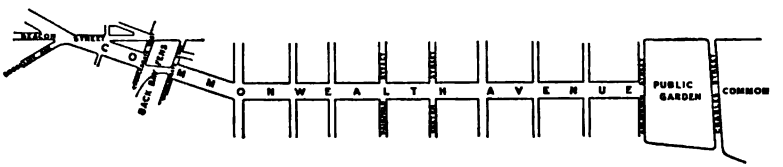
with riding and driving an automobile at a rate of speed greater than eight miles an hour on Commonwealth Avenue in Boston, in violation of a rule of the board of park commissioners of that city.

On appeal to the Superior Court, the case was tried before *Aiken*, J., who refused to make the rulings requested by the defendant. The jury returned a verdict of guilty, and the judge imposed sentence, but, being of opinion that there was a reasonable doubt whether such judgment should stand, made a certificate to that effect, and the defendant alleged exceptions, raising the questions stated by the court.

The following reduced copy of a plan attached to the bill of exceptions shows the portion of Commonwealth Avenue which is under the control of the park commissioners:



F. R. Bangs, (*B. Wendell, Jr.* with him,) for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth, submitted a brief.

LATHROP, J. The defendant was found guilty of violating a rule of the board of park commissioners of the city of Boston, which provides that "No person shall ride or drive in Commonwealth Avenue at a rate of speed exceeding eight miles an hour." At the trial it appeared that the defendant, on November 30, 1903, was running an automobile at a rate of speed exceeding eight miles an hour, in Commonwealth Avenue between Exeter Street and Fairfield Street. Many objections were raised in the court below, and come before us on the defendant's exceptions. So much of Commonwealth Avenue as lies between Arlington Street and the intersection of that avenue with Beacon Street was taken for park purposes by the board of park commissioners on June 29, 1894.

1. It is contended that the board of park commissioners never acquired any jurisdiction over the part of Commonwealth Avenue where the offence was committed. This depends on the construction to be given to the St. of 1893, c. 300, § 1. This

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section is as follows: "Any board of park commissioners constituted under the authority of chapter one hundred and fifty-four of the acts of the year eighteen hundred and eighty-two as amended by chapter two hundred and forty of the acts of the year eighteen hundred and ninety, or of any special acts, shall have power to connect any public park, boulevard or driveway under its control, with any part of any city or town in this Commonwealth wherein it has jurisdiction, by selecting and taking any connecting street or streets, or part thereof, leading to such park, and shall also have power to accept and add to any such park any street or part thereof which adjoins and runs parallel with any boundary line of the same: provided, that the consent of the public authorities having control of any such street or streets so far as selected and taken, and also the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on such street or streets so far as taken, shall be first obtained."

It appears that the public authorities having control of Commonwealth Avenue assented to the selection and taking of the portion of the avenue taken, and that the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on the avenue has been obtained. The contention of the defendant is that as the board of park commissioners has no control over the Public Garden, which abuts on Arlington Street for the entire length of that street, it could not take the avenue for the purpose of connecting the Public Garden with the Back Bay Fens. But we are of opinion that the language of the statute is broader than this. The board of park commissioners is expressly given the power "to connect any public park, boulevard or driveway under its control," (in this case the Back Bay Fens,) "with any part of any city or town in this Commonwealth wherein it has jurisdiction, by selecting and taking any connecting street or streets, or part thereof, leading to such park." The object of the statute was to give a board of park commissioners having jurisdiction of a park in any city or town power to take, under the conditions above set forth, any street connecting with that park in the same city or town, and was not limited to the taking of a street connecting two parks.

The view which we have adopted is in accordance with that

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taken by the Commissioners on the Revised Laws, and adopted by the Legislature: "Such boards may connect any public park, boulevard or driveway, under its control, with any part of a city or town for which they are appointed by taking any connecting streets, or part thereof leading to such park," etc. Report of Commissioners, c. 28, § 3. R. L. c. 28, § 3.

2. It is next contended that, if the park commissioners had jurisdiction over that part of Commonwealth Avenue where the offence was committed, their jurisdiction was limited to acts of maintenance and management, and did not embrace the power to pass the rule in question. But § 3 of the St. of 1893, c. 300, reads as follows: "Such boards of park commissioners shall have the same power and control over the streets or parts of streets taken under this act as are or may be by law vested in them concerning the parks, boulevards or driveways under their control."

To ascertain the power of the board we turn to the St. of 1875, c. 185, § 3, which not only gave the board power to take land for parks, and "to lay out, improve, govern and regulate" the same, but also "to make rules for the use and government thereof, and for breaches of such rules to affix penalties not exceeding twenty dollars for one offence." Power is also given to employ a police force.

We cannot doubt the power of the board of park commissioners, under the statutes cited, to regulate the speed at which a person shall "ride or drive" in a park or in a street which is within the jurisdiction of such commissioners. In *Commonwealth* v. *Abrahams*, 156 Mass. 57, where a rule made by the park commissioners under the St. of 1875, c. 185, § 3, was held to be valid, it was said in the opinion of the court: "The parks of Boston are designed for the use of the public generally, and whether any park or a part of any park can be temporarily set aside for the use of a portion of the public is for the park commissioners to decide, in the exercise of their discretion."

The general question which arises where a by-law or ordinance of a city, or a rule of a board of park commissioners is concerned is whether it is authorized by a statute, and whether it is reasonable. See *Commonwealth* v. *Stodder*, 2 Cush. 562, 570. The rule in question was authorized by statute and was reasonable.

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No question has been raised as to the power of the Legislature to authorize the board of park commissioners to make the rule relied upon, and it is evident that such contention, if made, could not prevail. *Brodbine* v. *Revere*, 182 Mass. 598, 602.

3. The next contention is that if the board of park commissioners had power to pass rules, such power was taken away by subsequent legislation. The argument is that because the St. of 1902, c. 315, regulated the speed of automobiles throughout the State, it abrogated all park regulations. It is clear however that this statute was not intended to apply to park regulations. It refers to the speed of automobiles on public highways, streets and ways. This act was repealed by the St. of 1903, c. 473, § 15, the previous section containing a clause that "nothing herein contained shall be so construed as to affect the rights of boards of park commissioners as authorized by law." The reason for this is that the act contains certain general regulations which apply to all automobiles, but § 8, which applies to speed limit only, applies to a public way or private way laid out under the authority of statute.

4. The next contention is that under § 14 of the St. of 1903, c. 473, no regulation of the park commissioners shall be effective unless notice of the same is posted conspicuously at the points where any road affected thereby joins other roads. But a reading of the section shows very clearly that the last sentence of the section applies only to special regulations made by boards of aldermen of cities and selectmen of towns, and has nothing to do with boards of park commissioners. The section reads as follows: "Nothing herein contained shall be so construed as to affect the rights of boards of park commissioners as authorized by law. Boards of aldermen of cities and the selectmen of towns may make special regulations as to the speed of automobiles and motor cycles, and as to the use of such vehicles upon particular roads or ways, including the right to exclude them altogether therefrom. Such exclusion, however, shall be subject to an appeal to the Massachusetts highway commission, whose decision in the case shall be final. No such special regulation shall be effective unless notice of the same is posted conspicuously at the points where any road affected thereby joins other roads."

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5. The last contention is that the rule of the board of park commissioners is too indefinite to support criminal proceedings. Fault is found with the words "ride or drive"; but we are of opinion that a person may be said to be driving an automobile if he is controlling the motive power.

We find nothing else in the case which requires special consideration.

Exceptions overruled.

DANIEL H. BRADLEY, administrator, *vs.* PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Suffolk. November 16, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Insurance, Life.

A married woman, after taking out a policy of life insurance for $500 on her own life, separated from her husband, and thereafter went through a form of marriage with one M. with whom she lived until her death, being known as his wife. M. paid weekly premiums on the policy, partly with money supplied by the insured and partly with his own money. After the death of the insured he paid her funeral expenses amounting to $158, and delivered to the company the usual proofs of death. The policy contained a provision, that the company might pay the sum insured "to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose." The company in good faith paid to M. the amount insured by the policy. In an action on the policy by the administrator of the estate of the insured, it was *held*, that the payment to M. discharged the obligation of the defendant under the policy and was a good defence to the action, and that it did not matter whether M. was equitably entitled to the payment if he appeared to the defendant to be equitably entitled to it within the stipulation of the policy.

CONTRACT on a policy for $500 issued by the defendant upon the life of Mary Sawyer, the plaintiff's intestate. Writ dated March 18, 1903.

The case was submitted to a judge of the Superior Court upon an agreed statement of facts, the substance of which appears in the opinion. The judge found and ordered judgment for the defendant; and the plaintiff appealed.

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J. F. Lynch & D. H. Bradley, for the plaintiff.

C. T. Cottrell, for the defendant.

BARKER, J. This action upon an insurance policy of the kind commonly known as industrial insurance after having been decided in favor of the defendant upon a hearing upon a statement of agreed facts is here upon the plaintiff's appeal.

The policy was on the life of one Mary Sawyer and was issued upon her own application in the year 1896. She was then the wife of one Henry C. Sawyer and continued to be his wife until the time of her death on September 25, 1902. After taking out the policy she and her husband separated and lived apart. After the separation she and one Murphy went through the form of marriage and lived together as husband and wife until the time of her death, she being known as Mary Sawyer Murphy. The weekly premiums on the policy were paid partly by her and partly by Murphy with money received from her and partly by Murphy with his own money. The amount of premiums paid by him is unknown. After her death he paid her funeral expenses amounting to $158. He made and delivered to the company the usual proofs of death during the first part of October, 1902, and on or about October 14, 1902, the full amount due on the policy $507.50 was paid to him by the company. He had paid the funeral expenses before he received that payment, and that fact was known to the company when it made the payment to him. The proofs of death stated that he was the husband of the deceased. The company claims that the payment to him was made under the clause of the policy entitled "Article Second" and believed that he was the person who best fulfilled the requirements of that article inasmuch as he had paid a part of the premiums and had incurred and paid the expense of the burial of the insured, his alleged wife. It is further agreed that all the acts of the company were in good faith, and that the only question for the consideration of the court is whether or not the payment to Murphy is a defence to this suit. After that payment the rightful husband of the insured demanded payment of the amount of the policy from the company, and the demand being refused the plaintiff was appointed administrator of the estate of the insured and brought this suit. It is agreed that if the payment to Murphy is a full and complete bar to the plain-

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tiff's claim judgment is to be entered for the defendant; if that payment is not a legal defence, it is agreed that the plaintiff shall have judgment for $507.50 and interest from October 14, 1902.

The promise made by the company in its policy is to pay a certain sum to the executors, administrators or assigns of the insured "unless settlement shall be made under the provisions of article second hereinafter contained." If then such settlement has been made the contract has been performed according to its tenor, and the plaintiff cannot recover, because there has been no breach. The article is as follows: "Second. The company may pay the sum of money insured hereby, to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose, and the production by the company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

A receipt of Murphy for the sum of $507.50 from the company reciting that the payment is in full for all claims against the company under the policy is part of the statement of agreed facts.

We think that the claim of Murphy made in the proof of death, and the payment made by the company claiming to act in so doing under the provisions of the article quoted, it being agreed that all the acts of the company were done in good faith, was a complete performance by it of its contract of insurance. Under the circumstances as they are disclosed in the statement of agreed facts there is no promise to pay to the plaintiff, and the payment stipulated for has been made in accordance with the terms of the policy. The plaintiff contends that Murphy was not equitably entitled to the payment. But the stipulation is not as to payment to one in fact equitably entitled to payment, but is as to payment to any person appearing to the company to be equitably entitled to the same. Such stipulations are common in industrial policies, the amounts of which always

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are small, and one purpose of them is to enable the amount of the policy to be paid very speedily after the death of the insured, without the delay or expense of taking out administration, and another purpose is to remove the chance of litigation between claimants. The insurance being taken out by the person whose life is insured and the person to whom the policy is paid under the provisions of such articles being either a relative or in the position of a creditor, we see no ground for holding such an article void as against public policy. In effect the article gives the company power, acting in good faith, to discharge its debt and perform its contract by making payment to any person who is a relative by blood or marriage of the insured or who has incurred expense for the insured. See *Thomas* v. *Prudential Ins. Co. of America*, 148 Penn. St. 594; *Metropolitan Ins. Co.* v. *Schaffer*, 21 Vroom, 72. In *Shea* v. *United States Industrial Ins. Co.* 23 App. D. (N. Y.) 53, the company in making payment under a similar article acted in bad faith, with the purpose of cheating the person who had paid the premiums, and to whom it had promised to make payment under the article.

Judgment for the defendant affirmed.

GIROLMO SOLARI *vs.* WILLIAM L. CLARK & another.

Suffolk. November 16, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Employer's liability.

It is the duty of the superintendent of a contracting mason, who as such superintendent has charge of the construction of a staging surrounding a large chimney in process of construction for the workmen to stand upon in laying bricks, the floor of which has to be raised from time to time as the work proceeds, not to allow the staging to be used at a height of twenty-five or thirty feet above the ground until he has used due diligence to see that it is constructed and secured properly, and if he fails to observe that a putlog supporting the floor of the staging does not rest on a ledger board but rests on an insecurely nailed stay in which there is a knot, and if a workman is injured by the falling of the staging as he goes upon it in carrying up a hod of bricks, the workman in an action against his employer may go to the jury upon the question of the negligence of the defendant's superintendent.

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TORT by a workman against his employer, a contracting mason engaged in constructing a large chimney for the Somerville Electric Company at Somerville, for personal injuries from the falling of a staging as the plaintiff went upon it in carrying up a hod of bricks, with six counts, of which the sixth alleged that the injuries were caused by the negligence of a person in the service of the defendant entrusted with and exercising superintendence. Writ dated December 27, 1900.

At the trial in the Superior Court before *Holmes*, J., the judge required the plaintiff to elect upon which count he would go to the jury, and the plaintiff elected the sixth count charging negligence of the defendants' superintendent, whereupon the judge ordered a verdict for the defendant upon the first five counts. The judge refused to order a general verdict for the defendant, and submitted the case to the jury on the sixth count. The jury returned a verdict for the plaintiff in the sum of $3,700; and the defendants alleged exceptions.

G. W. Buck, for the defendants, submitted a brief.

F. R. Bangs, for the plaintiff.

BARKER, J. The defendants employed the plaintiff and others in constructing a large circular tower of brick which at the time of the accident had been built up some twenty-five or thirty feet above the surface of the ground. A staging of lumber was used to support the masons and the brick and mortar which they were to use. The staging was planned by one Moore, who upon the evidence could have been found to have been a superintendent within the meaning of R. L. c. 106, § 71. As the tower was built higher it became necessary from time to time to place and support at a higher level the planks which formed the floor of the staging. These planks rested on joists called putlogs which at one end were built into the brick work of the tower and at the other rested upon boards nailed to the upright posts of the staging. There were two classes of boards so nailed. One class was nailed to the inside of the uprights and were called ledger boards, and there was evidence tending to show that they were designed to hold up the putlogs on which the planks which constituted the floor of the staging rested. The other class were called stays, and there was evidence tending to show that their only office was to keep the uprights in

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their perpendicular position, although there was perhaps some evidence that the stays also supported the putlogs. Soon after the floor of the staging had been raised for the third or fourth time, as the plaintiff was upon it in the course of his work the staging broke and he was thrown to the ground. It is conceded that he was in the exercise of due care and that due notice was given under the statute. At the trial he elected to rely upon the sixth count of his declaration, and the judge directed a verdict for the defendant upon all the other counts, refused to direct such a verdict upon the sixth count, and left that count to the jury, who found upon it for the plaintiff. The case is here upon the defendants' exception to the refusal of the judge to order a verdict for them upon the sixth count, and the question for decision is whether there was evidence from which it properly could be found that the fall of the staging was the result of negligence of Moore in exercising superintendence.

It is plain that the staging was not one of those which the masons employed upon a job of brick work are expected to build for themselves. On the other hand it also is plain that enough proper materials were furnished and kept on hand by the defendants for the construction of the staging. It fairly could be found from the evidence that the work of building the staging originally and of raising it whenever necessary was in charge of Moore the foreman, who also worked with his own hands, but at whose orders the plaintiff, and other ordinary workmen of his class, made excavations, handled lumber, or carried brick or mortar as Moore told them to do. It also could be found that the most of the manual labor of erecting and of raising the staging was done by Moore and by a workman named Gardella, described in the defendants' brief as the "handy-man" of the gang. The other common laborers as they were ordered at times brought boards for the staging to Moore and Gardella, and sometimes when the planks were to be raised to the next higher level the masons themselves helped pull them up. The evidence tended to show that the plaintiff was the first common laborer sent to take up bricks after the staging had been raised to the height where it was when the accident occurred, and that it happened as he was upon the staging with his third or fourth load.

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It also could be found that at the point where the staging gave way the outer end of a putlog, instead of being placed upon the ledger board, had been placed improperly upon a stay, and that the stay had been fastened to the upright with only two nails instead of a greater number, and that the nails had been so driven as to tend to split the stay, and that there was a knot in the stay. The theory of the accident is that the strain brought to bear upon the stay caused it to split, letting down the putlog and the floor of the staging. We think the evidence would not justify a finding that the knotty board was selected or nailed in position or the putlog placed upon it by Moore rather than Gardella. But we also think that it fairly can be found from the evidence that it was a part of the duty of superintendence resting upon Moore not to allow the staging to be used at the height to which it had just been raised until he had used due diligence to see that it was properly assembled and secured, and that the accident resulted from negligence on his part in failing to observe that the putlog did not rest on a ledger board and did rest on an insecurely nailed stay in which was a knot.

Exceptions overruled.

AMANDA WIXON *vs.* GEORGE E. BRUCE, trustee, & others.

ANTHONY WIXON *vs.* SAME.

Suffolk. November 18, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Landlord and Tenant. Nuisance. Ice and Snow.

The tenant of the ground floor and basement of a building under a lease by which he has covenanted to save the lessor harmless from any claim or damage arising from neglect in not removing snow and ice from the roof of the building and from the sidewalks bordering on the leased premises, the upper stories of the building being let to another tenant under a lease containing a similar covenant, has control of the sidewalks adjoining the building, and is liable to a person injured from falling on an accumulation of ice in front of the building caused by the discharge of water from a spout conducting the water from the roof of the building and that of another building adjoining it.

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TWO ACTIONS OF TORT, the first action by Amanda Wixon for personal injuries from a fall upon the sidewalk in front of the building numbered 111 and 113 on Blackstone Street in Boston, alleged to have been due to an accumulation of ice caused by the collection and freezing of water flowing from a conductor or spout on that building, against George E. Bruce, trustee, the owner of the building, and Charles J. Crowley and Daniel F. McCarthy, lessees of a portion of the building, added as defendants by amendment, and the second action by Anthony Wixon, husband of Amanda, against the same defendants, for damages alleged to have been sustained by him by reason of the injuries to his wife. Writs dated June 3, 1903.

In the Superior Court the cases were tried together before *Richardson*, J., without a jury. He found for the defendant Bruce in both actions, and in both actions found for the plaintiff as against the defendants Crowley and McCarthy, in the first case in the sum of $550, and in the second case in the sum of $250. The defendants Crowley and McCarthy alleged exceptions, raising the questions stated by the court.

G. C. Dickson, (*F. Paul* with him,) for the defendants Crowley and McCarthy.

E. P. Benjamin, for the plaintiffs.

LORING, J. These were two actions of tort for injuries suffered by the plaintiff in the first action, who was the wife of the plaintiff in the second action, from falling upon an accumulation of ice on a sidewalk in front of a building owned by the defendant Bruce, caused by the discharge of water from a conductor which took the water from the roof of that building and the building adjoining it. At the time of the accident the ground floor and basement of Bruce's building, with the exception of a hoistway and the stairs to the upper stories, were in the possession of the defendants Crowley and McCarthy as tenants for a term of years, and the upper stories, together with the hoistway and stairs, were in the possession of another tenant for a term of years. Each lease contained this covenant on the part of the lessee, to wit: "That they will . . . save the said lessor and his legal representatives harmless from . . . any claim or damage arising from neglect in not removing snow and ice from the roof of the building, or from the sidewalks bordering on the premises

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so leased." The lease to Crowley and McCarthy was dated August 1, 1901, and the other lease was dated May 1, 1900. The premises let to these two sets of tenants comprised the entire building.

The case was heard by a judge without a jury, who found that "the plaintiff Amanda Wixon, while travelling on said Blackstone Street, and while in the exercise of due care, fell upon the sidewalk in front of the store occupied by the defendants Crowley and McCarthy; and her fall was caused by an accumulation of ice on said sidewalk due to the collection and freezing of water flowing from said conductor or spout." The defendants Crowley and McCarthy asked the judge to rule that on all the evidence they were not liable. This was refused. They also asked for two rulings which were refused as immaterial, to wit: "7. If the building No. 113 Blackstone Street was not occupied by the defendants Crowley and McCarthy alone, but was leased to and occupied by other tenants besides Crowley and McCarthy, then, in respect to a conductor running from the roof of the building to the ground and used to conduct the water from the roof of the building, the owner of the building, and not the defendants Crowley and McCarthy, was in control of and the occupant of the conductor, as regards the responsibility for its existence and for its condition, and the obligation to keep it in repair." "8. If the building No. 113 Blackstone Street was leased to more than one tenant, so that the defendants, Crowley and McCarthy, did not occupy the entire building, — if Crowley and McCarthy had a lease of and occupied only the lower part of the building and the upper part was occupied by another tenant, then Crowley and McCarthy had no control over or responsibility for the existence or condition of the conductor running from the roof of the building to the sidewalk, and they had no duty in regard to it." The court made the following ruling: "That the defendants Crowley and McCarthy should not be held liable in this action by reason merely of any of their covenants contained in the said lease executed by and between them and the defendant Bruce, trustee; that the said lease was evidence on the question of their possession and occupancy and control of the premises therein and thereby demised and of the appurtenances by law attached thereto, including the

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sidewalk; and that, upon the evidence of their possession and occupancy of the premises described in said lease, and of the appurtenances by law attached thereto, including the sidewalk, and upon the other evidence in the case, they were liable in this action upon the ground that they had negligently suffered a dangerous accumulation of ice to remain on the sidewalk in front of their store."

The case is here on exceptions to the refusal of the judge to give these rulings. No exception was taken to the ruling made.

The principal argument of the defendants Crowley and McCarthy has been that however it may be *inter sese*, the responsibility to the public of the legal owner of the conductor for the time being cannot be affected by a private agreement between him and a tenant of a portion of the building. But that argument was put forward and denied in *Quinn* v. *Crimmings*, 171 Mass. 255. That was a case where the plaintiff was injured by the falling of a division wall, and, after stating that the argument now put forward had been made, this court said: "But examples of liability to the public being affected by private arrangements are not unknown. A landlord may shift his responsibility for snow falling from the roof of his house into the street by giving control to a tenant, and will have the right to rely upon the tenant's managing the premises in such a way as to prevent their becoming a nuisance. The fact that action, and not merely abstinence from illegal acts, on the part of the tenant is required to prevent the harm is not conclusive." p. 256.

That is decisive of this case. We assume here that the defendants were not tenants of the conductor or of the sidewalk, and we agree with the defendants' contention that one injured by a defect in premises could not maintain an action against a stranger who had for a consideration agreed to insure the owner and occupant against liability for damages caused by defects. But these defendants were not strangers. They were tenants of a portion of the building, and a covenant by a lessee of part of a building to save harmless the lessor from any claim arising from neglect in not removing snow and ice from the sidewalk is not a contract of insurance, but, in a case like this, at least where the lessor has let the entire building to these defendants and another tenant, is in effect a covenant to see that the conductor

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carrying off the water from the roof does not create a nuisance by discharging it on to the sidewalk where it would afterward freeze. That covenant gave these defendants control over the sidewalk, and brings the case within *Dalay* v. *Savage*, 145 Mass. 38; *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47; *Lufkin* v. *Zane*, 157 Mass. 117, and *Quinn* v. *Crimmings*, 171 Mass. 255. See also *Glynn* v. *Central Railroad*, 175 Mass. 510, 512.

The ruling made by the judge in effect means that the plaintiff could not have sued on the covenant between Bruce and these defendants, but that by reason of that covenant they became liable for the nuisance created by the conductor discharging water on to the sidewalk, which froze there, from which the plaintiff suffered a special damage.

Exceptions overruled.

CONGREGATION BETH ISRAEL *vs.* DENNIS F. O'CONNELL & another.

Suffolk. December 5, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Stable. Statute. Religious Society. Words, "Hire."

The provision of R. L. c. 102, § 70, that "No person shall, in a city, occupy or use a building for a livery stable or a stable for taking or keeping horses and carriages for hire or to let within two hundred feet of a church or meeting house erected and used for the public worship of God without the consent in writing of the religious society or parish worshipping therein," does not apply to a stable which is let out in specified parts to tenants who take care of their own horses. *Semble*, that the prohibition of the statute extends to a case where the back of a stable of the kind described in the statute is within two hundred feet of the back of a church although the buildings face on different streets.

BILL IN EQUITY, filed June 9, 1904, by a religious corporation having a church used as its place of worship at No. 9 in Baldwin Place in Boston, to restrain the defendants from erecting and using a stable at No. 49 on North Margin Street in that city for taking and keeping horses and carriages for hire or to let within two hundred feet of the church of the plaintiff with-

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out the plaintiff's consent in writing as required by R. L. c. 102, § 70.

In the Superior Court the case was heard by *Hardy*, J., who found the facts stated in the opinion of the court, and made a decree that the bill be dismissed with costs. The plaintiff appealed. At the request of the defendants a commissioner was appointed under Chancery Rule 35 to report the evidence to this court.

C. S. Hill, (*J. L. Crowley* with him,) for the plaintiff.

H. G. Allen, for the defendants.

LORING, J. This is a bill in equity by a religious corporation to enjoin the erection of a stable which is being constructed without its consent within two hundred feet of its church building, on the ground that it is a stable within the second clause of R. L. c. 102, § 70. A final decree was entered, declaring first that the building complained of was "to be used as a stable in the manner following and not otherwise: To let in such building to any person desiring to hire the same the right to keep a horse and vehicle therein in a specified place, such persons having the care, custody and control of such horse and vehicle; that said defendants will not keep, hire, or let for hire any horses or other animals in said premises"; secondly, "that the purpose for which the stable is to be built is not that of a livery stable or for keeping horses or carriages to let or for hire"; and that the bill should be dismissed with costs. The suit is here on an appeal by the plaintiff.

What we have under consideration here is not the rule but an exception to the general rule as to building stables in that class of cities which includes Boston. The rule is that no stable shall be built unless licensed by the board of health. R. L. c. 102, § 69. That rule has been complied with in the case at bar. The exception here under consideration is that buildings shall not be erected or used for certain kinds of stables within two hundred feet of a church, without the consent in writing of the religious society or parish worshipping therein. R. L. c. 102, § 70. Under the general rule any kind of stable may be licensed to be built within a foot of a private dwelling house or of a hotel. The general rule deals with the stable being a nuisance by reason of noise and smell, but the exception

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as to a stable within two hundred feet of a church must be taken to be based upon the fact that the kind of stable described in the exception will be likely to attract persons who would be obnoxious to a congregation of church goers.

The plaintiff relies on the words "a stable for taking . . . horses and carriages for hire." These words as well as the exception were doubtless taken from a special act as to the town of Boston, St. 1810, c. 124, which was under consideration in *Hastings* v. *Aiken*, 1 Gray, 163, and was finally repealed by St. 1889, c. 89, § 3. There the words are "taking in . . . upon hire." The word "hire" in that act must be taken to have its secondary meaning of compensation or pay as distinguished from its more accurate meaning of compensation for use, and the words "taking in . . . upon hire" to have been inserted to make certain that a boarding stable was within the act.

The defendants' scheme cannot be held to come within the prohibition against taking in horses for pay. What the defendants intend to do is to let out their stable or specified parts of it to tenants who take care of their own horses. We have here with respect to stables the familiar distinction between a tenant and a lodger in case of houses, as to which see *White* v. *Maynard*, 111 Mass. 250.

Even if it were thought that it would be as likely that persons obnoxious to church goers would resort to such a stable as the defendants here intend to conduct as would go to a boarding stable or to a livery stable, that consideration would not be material. Whether that is so or not so, is not a question for the court. The Legislature has drawn the line between stables where horses are taken in for pay or are kept to be let out on the one hand, and all other stables on the other hand. The only question for the court is to determine in which class the stable here in question belongs. We are of opinion that it comes within the latter class, because the defendants here do not propose to take in horses for pay, but to let out their stable in tenements for rent, the tenants taking care of their own horses.

It may be worth while to point out, although it does not affect the legal merits of the case, that the stable and church here in question face on different streets, and that it is only the back of the stable that is within two hundred feet of the back of the

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church. Under these circumstances there does not seem to be in fact much chance of the plaintiff congregation suffering from obnoxious persons resorting to the stable.

As the decree undertakes to recite that the stable is not within the statute because it is not "a livery stable or for keeping horses or carriages to let or for hire," omitting the word "taking," the decree should be modified by inserting that word; and so modified the decree dismissing the bill should be affirmed.

So ordered.

MARY GREGORY *vs.* AMERICAN THREAD COMPANY.

Hampden. December 6, 1904. — January 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Employer's liability. *Evidence*, Circumstantial, Collateral issues: remoteness.

In an action by a woman employed in a factory against her employer for having her hand caught and injured by a machine which she was operating starting of itself after she had stopped it, if it appears that the plaintiff had complained to the second hand in charge of the machines that the machine had stopped of itself and the man had replied that he would "have it fixed," and that the next morning the plaintiff complaining to the second hand that the machine was not running well, and asking him if he had fixed it, he replied "Yes, I have fixed the machine; that machine is all right"; and that afterwards, having pushed back the lever and brought the machine to a full stop, the plaintiff put her hand into the machine to find out whether it was working properly, when the machine started up and caught and injured her hand, there is evidence to go to the jury upon the questions, whether the plaintiff was in the exercise of due care, whether the second hand in charge, who was a person entrusted with the duty of seeing that the machinery was in proper condition within the meaning of R. L. c. 106, § 71, cl. 1, was negligent in not repairing the machine at all or in repairing it improperly, and whether the machine was defective, the fact that the machine started of itself being evidence upon the last two questions.

In an action of tort for personal injuries alleged to have been caused by the negligence of the defendant, if the plaintiff introduces evidence from which negligence of the defendant may be inferred he need not point out the particular act or omission which caused the accident.

In an action by an employee in a factory against her employer for having her hand caught and injured by a machine which she was operating starting of itself after she had stopped it, it is within the discretion of the presiding judge, to exclude as too remote evidence offered by the plaintiff to show that about eleven weeks before the accident the person offered as a witness was working on the

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same machine when it started of itself after being stopped and that the attention of the superintendent was called to the matter and the machine was taken to pieces and an attempt made to repair it.

LATHROP, J. This is an action for personal injuries sustained while in the employ of the defendant, in October, 1902. There are counts at common law and under the R. L. c. 106, § 71, cl. 1, 2. At the close of the evidence for the plaintiff, the judge ruled that upon the pleadings and evidence the plaintiff could not recover, and directed a verdict for the defendant. The case is before us on the plaintiff's exceptions.

We agree with the contention of the defendant that there was no evidence that the defendant was negligent in the manner of instructing the plaintiff, or in the hiring of any fellow servant of the plaintiff. On the remaining counts, we are, however, of opinion that the plaintiff was entitled to go to the jury. The facts in the case, as they appear from the plaintiff's evidence, may be briefly stated thus.

The plaintiff was a young woman twenty-seven or twenty-nine years old. She had been in the employ of the defendant eight weeks at the time of the accident, and it was her duty to run two lap winding machines which faced each other. The function of such a machine is to take cotton from six rolls, arranged along the upper part of the machine, run it through the machine, thereby stretching it, and wind it in a compact form in a single lap upon a bobbin at one end of the machine. At this end there is a lever with which to stop and start the machine. Along the sides of the machine are handles by which also the machine can be stopped and started; two of these are on the back and two on the front of the machine. The machine also stopped automatically when the bobbin was full. The plaintiff had to stop the machine twice in the morning and twice in the afternoon, for the purpose of cleaning it.

The day before the accident, while the plaintiff was cleaning the machine and when it had been stopped, it started up of itself and the plaintiff was struck over one of her eyes. She complained to one Greaves, a second hand, about the machine's starting of itself. Greaves said: "I will see to it. I will have it fixed." The next morning the plaintiff noticed that the machine was running a soft lap, that is, that the lap on the receiv-

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ing bobbin was not tight to the bobbin, as was usual. She took out that lap, but the next was the same. She then complained to Greaves, showed the lap to him and said it was running soft. He said: "The next one will be all right." The plaintiff then asked Greaves if he had fixed the machine, and he said: "Yes, I have fixed the machine; that machine is all right." The plaintiff then resumed her work.

In the afternoon the lap appeared to be running soft again, and the plaintiff pushed back the lever at the end of the machine, and brought the machine to a full stop. She then put her right hand over the bobbin to ascertain if the lap was soft. While her hand was in this position, the machine started up and her hand was caught and injured.

The defendant contends that the plaintiff was not in the exercise of due care, and has addressed to us an elaborate argument to show that instead of putting her right hand over the bobbin she should have held on to the shipper with her right hand and put her left hand over the bobbin, or have removed the bobbin. We are of opinion, however, that whether the plaintiff was in the exercise of due care was on the evidence a question of fact for the jury rather than of law for the court. *Donahue* v. *Drown*, 154 Mass. 21.

The next question is whether there was evidence of negligence on the part of the defendant. The plaintiff relies upon the negligence of Greaves, and also contends that the starting of the machine is some evidence that it was defective. We are of opinion that both of these contentions are correct, and that the question of the defendant's negligence was for the jury.

As to Greaves, it appears that he had charge of the operatives of the lap winding machines, and it was his duty to make all necessary repairs. He comes clearly within the R. L. c. 106, § 71, cl. 1. That he was negligent in not repairing the machine at all, or in not repairing it properly is a fair inference from the fact that the machine started of itself. For his negligence the defendant is responsible under the statute above cited; he is also liable at common law. *Donahue* v. *Drown*, 154 Mass. 21. *Mooney* v. *Connecticut River Lumber Co.* 154 Mass. 407. *Connors* v. *Durite Manuf. Co.* 156 Mass. 163.

The case seems to us more nearly to resemble the cases last

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cited than *Ross* v. *Pearson Cordage Co.* 164 Mass. 257, and *Kenneson* v. *West End Street Railway*, 168 Mass. 1, 2. In *Ross* v. *Pearson Cordage Co.* the machine was stopped by a fellow servant of the plaintiff, and it was said to be obvious that if the belt had not been entirely removed from the tight pulley to the loose one, there would be danger of the belt working on to the tight pulley and starting the machine. In the case before us the plaintiff testified that she stopped the machine, and she was sure that it was stopped. In *Kenneson* v. *West End Street Railway*, 168 Mass. 1, the motorman of an electric car, after arriving at his destination, and after the trolley had been shifted, took off the motor handles and went to the other end of the car, and was seen to stoop down and to take hold of the fender. The car shortly after started, and he was caught under the wheels and fatally injured. What caused the car to start was wholly uncertain; and it was held that there was no evidence of negligence on the part of the defendant. The case bears no resemblance to the one before us.

While the plaintiff was bound to introduce evidence from which the jury properly might infer that the accident was caused by the defendant's negligence, she was not required to point out the particular act or omission which caused the accident. *Mooney* v. *Connecticut River Lumber Co.* 154 Mass. 407, 409. *Melvin* v. *Pennsylvania Steel Co.* 180 Mass. 196, 202. *Kleibaz* v. *Middleton Paper Co.* 180 Mass. 363, 366.

The starting of the machine was some evidence that it was in a defective condition. *Packer* v. *Thomson-Houston Electric Co.* 175 Mass. 496, 499.

This is not a case where, assuming the plaintiff's story to be true, one's mind is left in entire uncertainty as to the cause of the starting of the machine.

There remains a single question of evidence to be considered. The plaintiff offered to show by a witness that, about eleven weeks before the accident, the witness was working on the machine and it started of itself after having been once stopped; that Greaves's attention was called to the matter, and the machine was taken to pieces and an attempt made to repair it, which the plaintiff contended was not effective. This evidence was excluded. We are of opinion that it was within the dis-

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cretion of the judge to exclude the evidence on the ground of remoteness. *Powers* v. *Boston & Maine Railroad*, 175 Mass. 466. *Tobin* v. *Brimfield*, 182 Mass. 117.

Exceptions sustained.

A. L. Green, for the plaintiff.

W. H. Brooks, for the defendant.

LOUIS SALTMAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 10, 1904. — January 6, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Contributory, In driving.

If one in driving approaches a double line of car tracks, where he knows that cars frequently are passing in both directions, and holds up his horse to allow a car to pass, and if immediately afterwards he drives upon the tracks without looking to see whether a car is coming from the opposite direction which he could not see or hear while the first car was passing, and is struck by such a car, he is negligent as a matter of law.

LATHROP, J. This is an action of tort for injuries resulting from a collision between an electric car of the defendant coming up Brattle Street into Harvard Square in the city of Cambridge, and a wagon which the plaintiff was driving. The collision took place about two o'clock in the afternoon on October 25, 1900.

At the trial in the Superior Court, the judge declined to rule that there was no evidence of negligence on the part of the defendant, but instructed the jury, as matter of law, that the plaintiff was not in the exercise of due care, and that his lack of care contributed to the injury; and directed a verdict for the defendant. The only question before us is raised by the plaintiff's exception to the latter ruling.

The plaintiff was driving, in an express wagon loaded with junk, from North Cambridge, intending to cross Brattle Street, which runs from the west side of Harvard Square, into Boylston Street, which runs from the south side of the square. The plaintiff's horse and wagon together were about twenty-two feet long.

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There are numerous tracks of the defendant in Harvard Square, and two tracks in the middle of Brattle Street, occupying a space of fourteen feet and nine inches. The plaintiff was familiar with the locality, as he passed through there about every day. He also knew that "there were a good many cars going through there all the time." Brattle Street is straight in the direction from Harvard Square towards Brattle Square, for a distance variously estimated at from one hundred to three hundred feet, but which appeared by an atlas of the city of Cambridge to be two hundred and sixty-two feet, where the street curves towards Brattle Square.

The plaintiff testified that the distance of the straight part of the street was from one hundred to one hundred and fifty feet.

The plaintiff also testified that as he approached the tracks on Brattle Street he was obliged to slow up to allow a car to pass him going from Harvard Square to Brattle Square; that while this car was passing he looked down Brattle Street but saw no car approaching from the other direction; that he could not say that he looked again after that; that as soon as the outward bound car passed him he drove straight along looking straight ahead; and that an inward bound car struck the hind wheel of his wagon, doing the injury complained of. The plaintiff further testified that there was nothing except the passing car to prevent the motorman of the car which struck him from seeing him or from his seeing the car.

On this evidence we are of opinion that the ruling of the court below was right. The plaintiff's looking while his view was obstructed by a passing car did him no good. Common experience teaches us that it is unsafe to cross a double line of tracks without looking to see whether a car is approaching on either line; and it also teaches us that if the view is temporarily obstructed one should wait until the view is unobstructed. The plaintiff in this case drove upon the second line of tracks when it was impossible for him to use his sight for his protection, and when he could not depend upon his sense of hearing, as it would be impossible for him to distinguish between the noise made by the car which was passing and that of the approaching car.

The case seems to us to come fairly within *Kelly* v. *Wakefield*

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& Stoneham Street Railway, 179 Mass. 542, *Hurley* v. *West End Street Railway*, 180 Mass. 370, and *Dunn* v. *Old Colony Street Railway*, 186 Mass. 816. See also *Donovan* v. *Lynn & Boston Railroad*, 185 Mass. 533.

Exceptions overruled.

E. Greenhood, (*J. Bon* with him,) for the plaintiff.

H. Bancroft, for the defendant.

ANNIE ROSEN *vs.* CITY OF BOSTON.

Suffolk. November 14, 15, 1904. — January 6, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Evidence, Presumptions and burden of proof. *Municipal Corporations*, Liability for accident on ferryboat operated by city. *Carrier*, Of passengers.

In an action against a city for injuries caused by the plaintiff slipping on a lump of ice frozen upon the deck of a ferryboat operated by the defendant, if it appears that the accident happened on the twenty-fifth of January and no evidence is introduced as to the actual temperature, it will be presumed to have been that of ordinary winter weather.

In an action against a city, for injuries sustained while a passenger on one of a line of ferryboats operated by the defendant, caused in ordinary winter weather by the plaintiff slipping on a lump of ice about three inches long and an inch and a half wide, about as thick as a person's finger and in the middle a little higher, frozen to the deck so solidly that it could not be picked off by hand, in which it is admitted for the purposes of the case that the liability of the defendant is that of a carrier of passengers, the plaintiff on showing these facts has made out a *prima facie* case entitling him to go to the jury.

In an action against a city for injuries sustained while a passenger on one of a line of ferryboats operated by the defendant, in which it is admitted for the purposes of the case that the liability of the defendant is that of a carrier of passengers, it is no defence that the plaintiff and her mother, the only witnesses, illiterate and ignorant women, do not know the name of the ferryboat on which the accident happened, and it is for the jury to say whether the inability of the witnesses to give the name of the boat proceeds from their ignorance or is evidence that the whole claim is a fraud.

TORT by a passenger on an East Boston ferryboat operated by the city of Boston, for injuries from a fall alleged to have been caused by slipping on a lump of ice allowed to accumulate on the portion of the deck of the ferryboat used by travellers as a

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passageway in landing. Writ in the Municipal Court of the City of Boston dated February 19, 1902.

On appeal to the Superior Court the case was tried before *Lawton*, J., who refused to rule that the plaintiff could not recover, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $500; and the defendant alleged exceptions.

P. Nichols, for the defendant.

J. E. Young, for the plaintiff.

LORING, J. In this case the plaintiff slipped on a piece of ice on the deck of one of the defendant's ferryboats. She was a passenger at the time, from East Boston to Boston, together with her mother and sister in law. They had left the ladies' cabin and were on their way over the open space for foot passengers, forward of the house containing the cabin, when she slipped and fell so violently as to throw her baby, which she had in her arms, over on to her back. She described the piece of ice as a thin piece the size of a cake of soap, about three inches long and an inch and one half wide. Her mother (who was the only other witness) testified that after the plaintiff fell she went to see "what was the reason she fell there." She described the piece of ice as the plaintiff did, and added that she tried to pick it up but could not because it was frozen to the deck; that "it was about as thick as your finger," and "in the middle it was a little higher." The accident happened on or about January 25, 1902. The defendant conceded that it was liable as a common carrier, put in no evidence in defence except the statement of its examiner of claims that he was told to investigate the case and had been unable to find out anything about it, but asked for a verdict on the testimony of the plaintiff and her mother. This was denied and the jury found for the plaintiff. The case is here on an exception to the refusal of the judge to direct a verdict for the defendant.

We are of opinion that the plaintiff made out a *prima facie* case. No evidence having been put in as to the temperature, it must be taken to have been ordinary winter weather. In ordinary winter weather, such a piece of ice frozen to the deck so that it could not be picked off would not have frozen while the boat was running from East Boston to Boston, as the defendant

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contends might have been the case. That takes the case out of *Goddard* v. *Boston & Maine Railroad*, 179 Mass. 52. And we are of opinion that in respect to keeping this part of the deck in a fit condition for passengers going over it, the degree of care due on the part of the city as a common carrier is greater than that due from a town to keep its highways free from defects, both from the fact that this passageway is small, that passengers go over it in a crowd, and that the defendant's liability is conceded, for the purposes of this case, to be that of a carrier of passengers. That would distinguish this case from *Stanton* v. *Salem*, 145 Mass. 476, the other case in this Commonwealth principally relied on by the defendant, if that case were not distinguishable on the ground that the statutory liability of a town for a defect in a way is limited to cases where the town might have had notice of the defect complained of by the exercise of proper care.

The only other argument made in defence is the injustice of allowing this plaintiff to recover when she and her other witness testified that they did not know the name of the ferryboat on which the accident happened. The testimony of both witnesses given in the bill of exceptions shows that they were not only illiterate but ignorant. Without knowing the name of the boat it must be conceded that the defendant could not practically prepare a part of its defence. But it was for the jury to say whether this proceeded from the ignorance of the plaintiff and her mother, or was evidence that the whole claim was a fraud.

Exceptions overruled.

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CHARLES SEELE *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

WINFIELD P. PIERCE *vs.* SAME.

ANSEL B. PIERCE & another *vs.* SAME.

Middlesex. November 15, 1904. — January 6, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Contributory, In driving.

For one driving in a covered wagon with projecting sides cutting off the view except in front, after proceeding by the side of a street car track for three quarters of a mile, to turn suddenly across the tracks without looking or listening and with nothing to give assurance that a car is not near, going so slowly that considerable time must be taken in crossing the tracks, is negligence as matter of law, and a person thus driving whose team is struck by an electric car coming from behind at an excessive rate of speed cannot recover from the railway company for the injuries incurred. Nor can his employer sitting by his side.

THREE ACTIONS OF TORT, the first by the driver of an undertaker's wagon, the servant of Ansel B. Pierce and Winfield P. Pierce, copartners doing business as undertakers, the second by one of the partners who was sitting by the driver in the wagon, and the third by both partners as owners of the wagon and the horses, for injuries alleged to have been caused by the negligence of the defendant's servants in running an electric car at an excessive rate of speed against the wagon as it was crossing the defendant's tracks on Main Street in Melrose for the purpose of turning into Sylvan Street in that city. Writs dated May 26, 1902.

In the Superior Court the cases were tried together before *Bishop*, J. At the close of the plaintiffs' evidence, the judge ruled that the plaintiffs were guilty of contributory negligence, and ordered verdicts for the defendant. The plaintiffs alleged exceptions.

F. S. Hesseltine, (*R. R. Gilman* with him,) for the plaintiffs.

D. E. Hall, for the defendant.

BARKER, J. In the first two actions the plaintiffs sue for damages for personal injuries. The third action is for damages

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to the horses and wagon with which the plaintiffs in the first two actions were travelling on the highway when the accident happened. They were on Main Street coming from Melrose on the west side of the road which was the right hand side as they were driving, and the centre of the road was occupied by double tracks of the defendant's railway. They were in a two horse undertaker's wagon, preceding a funeral procession which was a considerable distance in the rear. The wagon was without windows and had a covered top, closed sides and rear, with an inside partition separating the driver's seat from the interior, which was completely filled with flowers. The sides projected forward of the seat so that the driver could not look back of the wagon without leaning outside of the wagon. Opposite the intersection of Sylvan and Main Streets the team was to cross the tracks to the left of the driver in order to enter Sylvan Street from the opposite side of Main Street. Some three fourths of a mile before reaching Sylvan Street the travellers had looked back to see the funeral procession which was then about an eighth of a mile in their rear, and on so looking back they saw no electric car. Just before and as they turned across the car tracks their horses were walking. For seventeen hundred feet back of the team Main Street was straight and with no buildings or cross streets, and with the view unobstructed. The travellers before turning the team across the track did not in any way look to see whether a car was approaching from behind, and they had not looked back since they did so when they were three fourths of a mile from the place where they intended to cross the tracks. When they turned to the left to cross the tracks — the horses walking — the team was struck by a car coming from behind, and which hit the team between the horses and the foot board or under the seat. Before the crash they did not hear the car and did not know that one was approaching. The evidence shows that there was another team on the street, going in the same direction and about two hundred feet behind the one which was struck, and that as the car passed the rear team the gong on the car was sounded. A witness who stood on the corner of Sylvan Street and saw the car and team approaching testified that the noise of the car "was a good loud noise — such a noise as a car makes going at a good speed." Other witnesses who were in the

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vicinity testified that they heard no bell rung or gong sounded as the car approached the team, but that they could not say it was not rung or sounded. There was evidence that the car was being run at an excessive rate of speed.

The burden was upon the plaintiffs to show that they were in the exercise of due care. We think the evidence did not justify such a finding. To drive for three fourths of a mile in a wagon which enabled the driver to see only in front, the team being within three or four feet of a street railway track upon which a car might at any moment come up from behind the team, and then to turn suddenly across the track without looking or listening, and with nothing to give assurance that a car is not near, and with the team going so slowly that considerable time must be taken in crossing the tracks, is to act in disregard of a known danger. We think that in the present instance it was contributory negligence. See *Saltman* v. *Boston Elevated Railway*, *ante*, 243.

Exceptions overruled.

MARY E. GALVIN *vs.* CHARLES L. BEALS.
SAME *vs.* WINCHENDON SAVINGS BANK.

Middlesex. November 15, 1904. — January 6, 1905

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Landlord and Tenant.

A landlord is not liable for an injury to a tenant from a fall caused by the giving way of a rotten railing of a piazza which the landlord has not agreed to repair and the tenant has not asked him to repair, although the landlord's agent in charge of repairs has noticed the railing two weeks before the accident and has found it weak and shaky and after making certain repairs including a new board in the floor of the piazza has assured the tenant that everything is safe and sound, and that she need not fear to use the piazza; and the fact that the agent at the request of the tenant has made the other repairs is immaterial.

TWO ACTIONS OF TORT by the same plaintiff against different defendants for damages arising from the same accident, described in the opinion. Writs dated December 14, 1899, and July 19, 1901.

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In the Superior Court the cases were tried together before *Sheldon*, J., who in each case made the ruling stated in the first paragraph of the opinion and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. J. Irwin, for the plaintiff.

T. Hunt, for the defendants, was not called upon.

LATHROP, J. These are two actions of tort, tried together in the Superior Court, to recover for personal injuries sustained by the plaintiff, in consequence of the giving way of a railing of the piazza of the house in which she was the sole tenant. At the close of the plaintiff's evidence the judge ruled in each case that there was no evidence of misfeasance on the part of the defendant as distinguished from a mere non-feasance, and that there was no evidence to warrant a verdict for the plaintiff; and on that ground directed a verdict for the defendant. This ruling was excepted to, and is the principal question in the case. There is also an exception to the exclusion of evidence, to which we shall refer hereafter.

The bill of exceptions leaves us in doubt whether there was sufficient evidence to hold either defendant as the landlord of the plaintiff, but we shall assume, for the purposes of the case, that one or the other of the defendants might have been found to be the landlord, and that the ruling was made on another branch of the case.

The plaintiff's evidence tended to show that she hired the house in question in April, 1899, of George C. Beals, son of the defendant in the first case; that Beals let houses for his father and also for the defendant in the second case, in the same neighborhood where the house he let to the tenant was situated. George C. Beals had made repairs upon the house at several different times prior to September 1, 1899.

The plaintiff testified that about September 1, when George C. Beals came to collect the rent, she told him that she would not stay in the house any longer, and that he said: "Well, Mrs. Galvin, my father wants you to stay here, and I will make repairs right away, just tell me what you want of them, and I will see that it is done next week." She further testified that she told him that "the front door would not fasten, that there was no lock and knob on it, and that the front steps were not fit for

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use"; that Beals then said: "Everything will be fixed up next week sure"; that within a few days Beals brought lumber there, and two days after he put a new board in the floor of the piazza, a new tread in the steps, a door bell on the door, and that she heard him hammering there for quite a while.

The plaintiff further testified that two days later she made use of the piazza for the first time; that she stepped out of the front door on to the piazza, and went to the railing on the right as she came out to air a rug, and as she was in the act of doing so, leaning over the railing on the right, the railing as a whole gave way and she fell to the ground below.

On cross-examination the plaintiff testified that she did not remember that in any of her talks with Beals she had said anything about this rail, nor that he did.

George C. Beals, who was called by the plaintiff as a witness, testified that his father, the defendant in the first case, was the treasurer of the defendant in the second case; that he, the witness, let the house, and that his father had nothing to do with the letting or keeping the premises in repair. The witness also denied the conversation which the plaintiff testified to, but admitted repairing the steps; and testified that about two weeks before the accident he happened to notice the railing which gave way, and found it weak and shaky, but made no repairs upon it.

The testimony of George C. Beals is reported at length. The most significant part is that his father told him to take charge of certain houses and collect the rents, and that he felt that in taking charge he could make repairs.

For the purpose of showing negligence on the part of the defendants the plaintiff offered to prove that immediately after Beals had finished the work he assured the plaintiff that everything was safe and sound, and that she need not fear to use the piazza. The judge refused to admit the evidence on the question of the negligence of the defendants, but admitted it upon the question of the plaintiff's due care.

The general rule in this Commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs,

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and is negligent in making them. *Bowe* v. *Hunking*, 135 Mass. 380. *Tuttle* v. *Gilbert Manuf. Co.* 145 Mass. 169. *McKeon* v. *Cutter*, 156 Mass. 296. *McLean* v. *Fiske Wharf & Warehouse Co.* 158 Mass. 472. *Marley* v. *Wheelwright*, 172 Mass. 530.

The fact that the landlord makes other repairs is not evidence that he agreed to keep the premises in repair. *McKeon* v. *Cutter*, 156 Mass. 296. *McLean* v. *Fiske Wharf & Warehouse Co.* 158 Mass. 472.

It also has been held that where there is an agreement to repair the landlord cannot be held liable for a defect unless reasonable notice of such a defect is given to him. *Hutchinson* v. *Cummings*, 156 Mass. 329. *Marley* v. *Wheelwright*, 172 Mass. 530.

The plaintiff seeks to bring this case within *Gill* v. *Middleton*, 105 Mass. 477, where the landlord was held liable for negligence in making repairs which he had promised and undertaken to make. But there is no evidence in the case before us, that the alleged agent undertook to do anything about the railing, or that he did anything about it. The plaintiff complained to him of certain defects, and these he remedied. Nothing was said about the railing. The plaintiff has failed to bring her case within the one upon which she relies. The ruling of the judge that there was no evidence of a misfeasance was therefore right.

The evidence offered was immaterial to the issue. It did not tend to show that the agent had made repairs as to the railing, or had undertaken to do so. It must be shown, in order that the plaintiff may maintain her action, that repairs as to the railing were actually made and that the work was negligently done. The evidence, if admitted, would not have tended to show either of these essential elements.

Exceptions overruled.

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NELLIE FAULKNER *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. November 16, 1904. — January 6, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Res ipsa loquitur. Railroad.

The mere fact that an open window of a railroad car falls on the fingers of a passenger when the train starts is no evidence of negligence on the part of the operating company. If it appears that the bolt of the window worked by a spring and there is no evidence of a defect in the window or its catch, the inference is that the accident was caused by the negligence of the person who opened the window in not raising it far enough for the bolt to catch completely.

TORT, by a girl ten years of age, for injuries to two of her fingers on which a window of a car of the defendant fell as the train, in which the plaintiff was a passenger with her sister, started from a station in the city of Lawrence called North Lawrence on August 3, 1902. Writ in the Municipal Court of the City of Boston dated August 5, 1902.

On appeal to the Superior Court the case was tried before *Schofield*, J., who ordered a verdict for the defendant. The plaintiff alleged exceptions.

P. M. Keating, for the plaintiff.

A. R. Tisdale, for the defendant.

LORING, J. We are of opinion that the judge was right in directing a verdict for the defendant.

Taking the plaintiff's evidence, all that appears is that the window fell when the train started with its "usual motion." There was no evidence of a defect in the catch or in the window. When put up, the window was kept up by a bolt which rested on a metallic rest on the window jamb; this bolt was attached to the sash and was drawn back by pressing a spring; when the spring was released, the bolt flew out to its full length on to the rest. The plaintiff has argued that the testimony of Greim, who raised the window to release the plaintiff's fingers, warranted a finding that the window sash was loose in the window jambs, so that it moved from side to side more than it should have; and that this warranted the further finding that

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this was the reason why the window fell and caused the injuries here complained of. But we do not think that Greim's testimony can bear that construction. The answer to the question put by the defendant's counsel makes it plain (if it was not plain before) that the window jammed vertically, not horizontally, until the plaintiff's fingers were released.

The case which the plaintiff proved therefore was the falling of a window in good order on the train's starting with the usual motion. The only inference is that when the window was put up and the bolt released to keep it up, the window was not raised high enough for the bolt to be shot clean over its rest; in other words, that the cause of the accident was negligence in raising the window when it was opened.

The testimony of Greim that his window was up as high as it would go and the window in question appeared to be equally high, does not cover this point. If a window is up so that the bolt holds the window by being more or less in contact with the rest without lying on it fully, the difference in height would not be apparent between the lower part of the sash of that window and that of a window next it which was entirely up.

There was nothing in the evidence introduced by the defendant which helped the plaintiff. There was no evidence in the case at bar that the window was raised by the defendant's employees and not by a passenger. The case comes within *Kendall* v. *Boston*, 118 Mass. 234; *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572.

Exceptions overruled.

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FRANCIS C. WELCH, trustee, *vs.* WALTER AUSTIN & others.

Suffolk. November, 16, 1904. — January 6, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Equitable Restriction.

A grantor, owning adjoining land with a house on it, conveyed a lot on the corner of Arlington Street and Marlborough Street in Boston, by a deed containing the following provision: "The premises are however conveyed subject to the following restrictions and agreements: The dwelling house to be built on the granted premises shall be set back five feet from the line of Arlington Street, and shall not exceed sixty-five feet in depth from said street so as to correspond in this particular with my adjoining house. The front elevation and the material used in the construction of the front on Arlington Street shall correspond with my house adjoining according to the plan of G. J. F. Bryant herewith to be recorded, including a projection of about one foot on the front line as indicated on said plan. Two or three windows may be inserted in the front elevation from the second floor up, and one or two in the basement floor as may be preferred by the grantee or his representatives. The front on Marlborough Street shall be of freestone, and shall correspond as nearly as may be with the front on Arlington Street." *Held*, that the provision was more than a personal covenant and created a restriction for the benefit of the adjoining land of the grantor, but that this restriction was confined to the house about to be built when the deed was given and continued only so long as that house existed.

Semble, that on a petition under R. L. c. 182, § 11, to determine the validity, nature and extent of a restriction appearing of record to have been imposed on the petitioner's land more than thirty years before the filing of the petition, the question whether changed circumstances have made the enforcement of the restriction inequitable cannot be raised.

PETITION, filed February 16, 1904, under R. L. c. 182, § 11, by the owner of a lot of land numbered 8 on Arlington Street in Boston, to determine the validity, nature and extent of certain restrictions or stipulations appearing of record to have been imposed on the petitioner's land by a deed from Oliver Brewster to John Foster dated March 11, 1863.

In the Superior Court the case was heard by *Richardson*, J. upon an agreed statement of facts. The provision in question was as follows:

"The premises are however conveyed subject to the following restrictions and agreements:

"The dwelling house to be built on the granted premises shall be set back five feet from the line of Arlington Street, and

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shall not exceed sixty-five feet in depth from said street so as to correspond in this particular with my adjoining house. The front elevation and the material used in the construction of the front on Arlington Street shall correspond with my house adjoining according to the plan of G. J. F. Bryant herewith to be recorded, including a projection of about one foot on the front line as indicated on said plan. Two or three windows may be inserted in the front elevation from the second floor up, and one or two in the basement floor as may be preferred by the grantee or his representatives. The front on Marlborough Street shall be of freestone, and shall correspond as nearly as may be with the front on Arlington Street."

The judge found that the alleged restrictions were valid and were imposed for the benefit of the adjoining house and land of Oliver Brewster referred to in the deed from him to John Foster, and that a right or interest was created thereby in the nature of an easement in the granted premises which became appurtenant to the adjoining house and land; that the restrictions were intended to apply to all buildings which might at any time be erected on the granted premises, and bound the original grantee and his successors in title to observe and comply with the restrictions in erecting, rebuilding, repairing or altering in any manner any building upon the granted premises; that the right to the enforcement of the restrictions, as against the original grantee and his successors in title claiming under him with notice of the restrictions, was of such a nature that it would pass as annexed to the adjoining house and land to Brewster's successors in title.

The judge ordered a decree to be entered in accordance with these rulings, and, at the request of the parties, reported the case for determination by this court. If the decree was warranted upon the agreed statement of facts it was to be entered; otherwise, such modification was to be made therein or such other order was to be made as law and justice might require.

B. D. Barker, for the petitioner.

H. M. Davis, for the respondents.

LORING, J. The only question before the court is the nature and extent of the possible restriction, stipulation or agreement created by the deed of Oliver Brewster to John Foster, dated

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March 11, 1863, recorded with Suffolk Deeds, libro 825, folio 151.

We cannot accede to the petitioner's contention that the agreement in question is nothing more than a personal covenant on the part of John Foster. The case of *Clapp* v. *Wilder*, 176 Mass. 332, on which the petitioner has largely relied in support of that contention, went on the ground that the thing provided for there was put in the form of a common law condition; and although a stipulation put in the form of a common law condition may operate not only as a condition but as an equitable restriction as well, *Hopkins* v. *Smith*, 162 Mass. 444, there was not enough in that case to show that the common law condition there in question operated also as an equitable restriction.

The petitioner has relied also on the case of *Badger* v. *Boardman*, 16 Gray, 559. That case must be taken to rest on special circumstances. It was heard on the merits, and it is stated in the report that Downing, the grantor in the deed containing the "restriction" which the plaintiff sought to enforce, was "the owner of all these parcels of land, which were described on a plan thereof, dated the 12th of December 1843, and recorded in the registry of deeds." It must be assumed that that plan was before the court, although it is not set forth or otherwise described in the report. On an examination of it in the registry of deeds, it appears that the question then before the court was not the case of an owner of two lots selling one of them, as in the case at bar, but a more complicated situation. The grantor in that case owned seven lots on the westerly corner of Bowdoin and Cambridge Streets in the city of Boston. Five of the seven lots faced on Bowdoin Street and two on Cambridge Street. The lot conveyed to the defendant was lot No. 3; the lot which eventually came to the plaintiff was lot No. 4, next north of No. 3; and it was conveyed by the original grantor after lot 3 was conveyed. The lot on the corner was lot No. 5. All these lots faced on Bowdoin Street. Lots 6 and 7, facing on Cambridge Street, ran back across the rear end of lots 5, 4 and 3, to the southerly line of lot 3. There was nothing to indicate that the "restriction" in question forbidding any buildings or shed ever being erected westerly of the main building [on lot 3] "of a greater height than those now standing thereon" was for the

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benefit of lot 4 rather than of lots 6 and 7. In this situation the court seems to have cut the knot by holding that it was a personal covenant.

Skinner v. *Shepard*, 130 Mass. 180, the other case principally relied on by the petitioner, is a case where an action was brought for breach of a covenant of warranty in a deed from the defendant to the plaintiff. The breach relied on was that in a deed under which both claimed title there was a provision that no building should ever be placed within twenty-five feet of Green Street, on which the premises faced. The only fact in connection with this deed put in evidence by the plaintiff as showing that this provision constituted an equitable restriction and not a personal covenant was that the grantor, at the date of the deed in question, owned a parcel of land on the other side of a railroad which bounded the granted premises on the west. The granted premises were a tract containing over sixty-five thousand square feet of land, and the provision in question was coupled with a provision that the occupant of a part of the premises next the railroad, used for a lumber yard, should have six months in which to remove his lumber. The two provisions were not only coupled together, but were part of the same sentence. Under the rule previously laid down in *Episcopal City Mission* v. *Appleton*, 117 Mass. 326, 329, each part of this provision must receive the same construction. It is plain that the latter part of the provision requiring the lumber to be removed within six months was not an equitable restriction. On these facts it was held that the plaintiff had not made out that the provision in question was anything more than a personal covenant.

In the case at bar the things provided for are stated to be "restrictions and agreements" subject to which the land was conveyed. From the nature of the provisions, namely, a set back from the street in front, a limit to the depth of the house on the back and a specified façade which was to make the house to be built on the lot conveyed one building with the house already built on the land of the grantor and the two houses next south of it, are in their nature matters which would benefit the adjoining land of the grantor; and, as if to put beyond a doubt the question of this restriction having been imposed for the benefit of the only lot remaining owned by the grantor, it

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is stated in the deed that the restrictions are imposed so that the house to be built on the lot conveyed shall correspond with the adjoining house of the grantor. We are of opinion that these provisions must be taken to have been inserted for the benefit of the adjoining land of the grantor, and constituted agreements which will be enforced as equitable restrictions. *Peck* v. *Conway*, 119 Mass. 546.

But we are of opinion that the petitioner is correct in his contention that the duration of the restriction in the case at bar was limited to the life of the first house erected on the granted premises.

This case is governed by *American Unitarian Association* v. *Minot*, 185 Mass. 589. Indeed there is a reason here for holding the restriction to be thus limited in its duration which we did not have in that case. That is the provision that: "The front elevation and the material used in the construction of the front on Arlington Street shall correspond with my house adjoining according to the plan of G. J. F. Bryant herewith to be recorded, including a projection of about one foot on the front line as indicated on said plan. Two or three windows may be inserted in the front elevation from the second floor up, and one or two in the basement floor as may be preferred by the grantee or his representatives. The front on Marlborough Street shall be of freestone, and shall correspond as nearly as may be with the front on Arlington Street, or however otherwise said premises may be bounded, measured or described." The plan referred to is a plan of three houses; the house here in question on the corner, Brewster's house and the house next beyond on the south. The façade shown is a façade of what is, together with the house on the grantor's lot, the house next to it and the other corner house (which is not drawn out but is indicated on the drawing), one building. It hardly could have been the intention to restrict in this minute way in perpetuity the buildings to be erected on this lot of land.

The respondents contend that this case is not governed by *American Unitarian Association* v. *Minot*, because in that case five of the six houses there in question had been torn down and buildings erected in their place which were not dwelling houses, and that while the sixth still stood, it had been converted into a

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hotel. In the case at bar on the contrary, the house owned by Brewster at the date of the deed to Foster here in question is still used as a dwelling house. Had the decision in *American Unitarian Association* v. *Minot* gone on the ground that by reason of a change in circumstances within *Jackson* v. *Stevenson*, 156 Mass. 496, a perpetual restriction would not be enforced in equity, these facts might make a difference. But not only did that case not go on that ground, but it is expressly stated in the opinion that it was not necessary to express an opinion on the question whether the doctrine of *Jackson* v. *Stevenson* could be raised in a petition at law under the statute to ascertain the limits of a restriction. It seems plain that no such consideration can be gone into in such a petition. See *Crocker* v. *Cotting*, 181 Mass. 146, 153. More than that, where a restriction which is limited in its duration has come to an end, no question of the application of the doctrine of *Jackson* v. *Stevenson* can arise. That doctrine can cut down in effect the duration of an equitable restriction, but it cannot prolong a restriction which in terms is limited in a particular way. The same is true of the respondents' contention here that so long as their house is used for a dwelling house the restriction on the petitioner's land is to continue in existence. The parties to the deed in question could have provided that the restrictions should apply to any building erected on the land conveyed so long as the dwelling house then erected on the grantor's land should stand unchanged. But they did not do so. What they did provide was that "the dwelling house to be built on the granted premises" should be built in the way provided, so as to correspond with the grantor's "adjoining house." This might terminate the duration of the restriction but cannot prolong it. For example, if Brewster had torn down the dwelling house then standing on his lot before a dwelling house was built on the granted premises, the restriction might perhaps have been thereby brought to an end. But by the terms of the provision adopted by the parties the duration of the restriction was measured by the life of "the dwelling house to be built on the granted premises." We are of opinion that the restriction created by this deed expires when the dwelling house now on the petitioner's lot is torn down.

The decree entered by the Superior Court must be modified accordingly. *So ordered.*

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CARRIE E. HUTCHINSON, administratrix, *vs.* IRA A. NAY.

Suffolk. November 28, 29, 1904. — January 6, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Partnership, Good will.

On the dissolution of a partnership by the death of one of the partners the good will of the partnership business is a part of the assets of the partnership, and, in the absence of an agreement between the partners on the subject, the executor or administrator of a deceased partner has a right to have it sold in the liquidation of the assets of the partnership.

In this Commonwealth, where a sale of partnership assets including the good will of the partnership has been forced upon a surviving partner by the administrator of a deceased partner, the surviving partner has the right to enter at once on a competing business and solicit trade from customers of the firm.

Where the survivor of two partners in the teaming business after the death of his partner carries on the business in his own name at the old stand with only slight changes in the personnel of his customers for nearly two years, and then sells the good will of his business with a covenant to remain in the employ of the purchaser for six months and to do all in his power to hold the customers for the purchaser and with another covenant not to engage in the teaming business within the district covered by the old business for five years, he is under no obligation to account for the proceeds in even a nominal sum to the executor or administrator of his former partner, as the good will sold is his own and not that of the former partnership.

BILL IN EQUITY, filed July 17, 1903, by the administratrix of the estate of Joseph I. Hutchinson, who died on January 31, 1901, against the defendant as surviving partner of the firm of Ira A. Nay and Company, which consisted of the defendant and the plaintiff's intestate, praying for an account of the proceeds of the good will of the late firm alleged to have been sold by the defendant after the filing of the bill in the suit between the same parties, in which the decision of this court was made which is reported in 183 Mass. 355, and for an order to the defendant to pay to the plaintiff her just and proper share of such proceeds.

The case came on to be heard before *Braley*, J., who reserved it upon the pleadings and the evidence for determination by the full court, such decree to be entered as law and justice might require.

W. P. Hale, (*F. P. Carr* with him,) for the plaintiff.

F. N. Nay, (*R. E. Buffum* with him,) for the defendant.

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LORING, J. In the previous suit, *Hutchinson* v. *Nay*, 183 Mass. 355, the plaintiff sought to charge the defendant with the value of the good will of the former firm of Ira A. Nay and Company, which was dissolved by the death of Hutchinson, on two grounds, namely, that the defendant, the surviving partner, had agreed with the administratrix of Hutchinson's estate, the plaintiff, to buy the good will of the firm; and secondly, that he had appropriated it to himself and so was bound to account for its value. The present bill is founded on the fact that while the first bill was pending the defendant sold the good will for $5,000.

We are inclined to think that the plaintiff is barred by the former suit from raising the question which is the subject of the present bill. See *Foye* v. *Patch*, 132 Mass. 105. But the effect of the sale of good will which has been made by the defendant has not been in fact considered by the court, and as the plaintiff in the opinion of the court is not entitled to maintain the present bill, even if the question is still open to her, we have thought it more satisfactory to dispose of the case on the merits of the question.

We are of opinion that on the dissolution of a firm caused by the death of one of the partners, the good will of the firm's business is a part of the assets of the partnership, and, in the absence of an agreement between the partners dealing with the matter, the administrator of a deceased partner has a right to have it sold as part of the assets of the firm. But we also are of opinion that a sale thus forced upon the surviving partner does not stand on the same footing as a voluntary sale by a sole trader of the good will of his business.

The law of good will is of recent growth. One hundred years ago it was the law of England that the good will of a partnership survived for the benefit of the living partner. *Hammond* v. *Douglas*, 5 Ves. 539. That is not so there to-day. To-day, on the contrary, in England on the death of a partner, the executor or administrator of the deceased partner can have the good will sold as one of the assets of the firm. *Johnson* v. *Helleley*, 2 DeG., J. & S. 446. *Hall* v. *Barrows*, 4 DeG., J. & S. 150. *In re David*, [1899] 1 Ch. 378, 382. Lindl. Part. (6th ed.) 445. In the growth of the law of good will in England an anomaly has crept in, which

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has not obtained here, that is, that one who has voluntarily sold the good will of his business can set up a competing business but cannot otherwise derogate from his grant. It is undoubted law in England to-day. *Trego* v. *Hunt*, [1896] A. C. 7. It was held in *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, that the result of working out the conflicting rights of the vendor and the purchaser of the good will of a business was this: The vendor can set up a competing business but he cannot solicit business from customers of the old firm. In *Ginesi* v. *Cooper*, 14 Ch. D. 596, Jessel, M. R., felt the anomaly which was involved in a rule which said to the vendor of his good will: You shall not derogate from your grant and so are forbidden to solicit business from customers of the old firm, but you may deal with them if they voluntarily come to you; and in *Leggott* v. *Barrett*, 15 Ch. D. 306, he enjoined such a vendor from dealing with the customers of the old firm. This gave rise to a variety of opinions, see *Pearson* v. *Pearson*, 27 Ch. D. 145, which were finally set at rest by the decision of the House of Lords in *Trego* v. *Hunt*, [1896] A. C. 7; and the line was finally drawn as it was drawn in *Labouchere* v. *Dawson*, L. R. 13 Eq. 322. But in delivering his opinion in *Trego* v. *Hunt*, [1896] A. C. 7, 19, Lord Herschell said, speaking of the result in *Labouchere* v. *Dawson:* "These circumstances appear to me to afford an indication that the courts recognized that their view of what was meant by 'goodwill' and the effect of a sale of it differed from the popular conception. Where the goodwill of a business is not sold under circumstances such as I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that whenever the goodwill of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business." To a similar

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effect see Lord Macnaghten in *Trego* v. *Hunt*, [1893] A. C. 7, 23, 24; and Lord Davey, [1893] A. C. 27, 29.

What Lord Herschell there suggests might have been held in England has been held to be the law in Massachusetts. In Massachusetts the vendor of the good will of his business cannot set up a competing business at all, if by so doing he would derogate from his grant. *Webster* v. *Webster*, 180 Mass. 310.

But where a sale of partnership assets is forced upon the survivor by the administrator of a deceased partner, the surviving partner is not in the position of a sole trader who voluntarily has parted with the good will of his business. He is not bound to retire from business as a sole trader impliedly elects to do by voluntarily selling his good will. A sale of good will forced upon the surviving partner is like the sale of the good will of a sole trader by his trustee or assignee in bankruptcy. In that case it has been held in England that the bankrupt can not only set up a competing business, (a thing which may be done in England where a sole trader voluntarily sells the good will of his business, as has been shown,) but he may solicit business from his old customers, a thing which in England cannot be done in case of a voluntary sale. *Walker* v. *Mottram*, 19 Ch. D. 355. *Trego* v. *Hunt*, [1896] A. C. 7, 19, 23. No injustice is done to the estate of a deceased partner by this rule. If the estate gets all that the creditors of a sole trader can get, full justice is done to it, while to put the surviving partner in the position assumed by a sole trader who voluntarily has elected to sell his good will would be an act of great injustice. The law in England in this connection seems to be otherwise. In *In re David*, [1899] 1 Ch. 378, it was stated by Romer, J., in a case where there was an agreement for the sale of the good will on the death of one partner, that independently of that agreement the personal representative of the deceased partner had a right to have the good will sold, and if sold, the sale would be conducted on the basis on which the sale is conducted in case of a voluntary sale by a sole trader. And this had been assumed to be the law in the earlier cases of *Johnson* v. *Helleley*, 2 DeG., J. & S. 446, and *Hall* v. *Barrows*, 4 DeG., J. & S. 150, and has since been assumed to be the law in *Dixon* v. *Dixon*, [1904] 1 Ch. 161, and in *Curl Brothers* v. *Webster*, [1904] 1 Ch. 685. But the

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practical result of holding the surviving partner to be in the position of a sole trader who voluntarily has conveyed the good will of his business is so different in England from what it is here that the authority of these cases is not of great weight in this Commonwealth.

For these reasons we are of opinion that if a sale of the firm's good will had been asked for and ordered in the case at bar, it would have been directed to be conducted on the footing that the surviving partner was at liberty to enter on a competing business and to solicit trade from the customers of the old firm.

Where, therefore, the defendant in the case at bar, for a year and eleven months after the death of Hutchinson, carried on business at the old stand, with customers of the old firm, there being only slight changes in the personnel of the customers, and then sold the good will of his business, with a covenant to continue in the employ of the purchaser for six months and to do all in his power to hold the customers for the purchaser, and with another covenant not to engage in the teaming business for five years within the district covered by the old business, the good will sold was not the good will of the old firm but the good will of the defendant, and there is no obligation to account for even a nominal sum.

The entry must be *Bill dismissed with costs.*

PATRICK CONNOLLY *vs.* WILFRED BOLSTER & others.

Suffolk. December 5, 1904. — January 6, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Insurance, Against liability. *Equity Jurisdiction*, To reach and apply equitable assets. *Words*, "Defend", "Settle."

When a policy insuring against liability for bodily injuries caused by the negligence of the insured contains a provision, that no action shall lie for any loss under the policy unless brought by the insured "to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue," payment of the judgment by the insured is a condition precedent to liability of the insurance company.

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In a policy insuring against liability for bodily injuries to employees caused by the negligence of the insured, a provision that on notice of an action against the insured on account of an accident covered by the policy "the company will defend against such proceeding, in the name and on behalf of the assured," the word "defend" has its ordinary meaning and does not import an agreement to defend successfully, and if in spite of the defence judgment is given against the insured, the question whether the insurance company is bound to pay the amount of the judgment depends on the terms of its agreement to indemnify the insured against loss.

A provision in a policy against liability for bodily injuries caused by the negligence of the insured, that the insured shall not "settle any claim" without the consent in writing of the insurance company, does not refer to the payment by the insured of a judgment against him which by the terms of the policy is made a condition precedent to liability of the insurance company.

R. L. c. 159, § 8, cl. 7, giving a creditor the right to reach and apply to the payment of a debt equitable assets of his debtor deals with existing equitable rights and does not authorize a court of equity to complete inchoate rights to create property which then would be subject to attachment by trustee process in an action at law.

BILL IN EQUITY, filed November 22, and amended December 23, 1901, by the holder of a judgment against the defendant Edwin D. Bell for the sum of $4,017.33 damages and $27.62 costs, recovered in an action for personal injuries received by the plaintiff on March 8, 1899, while in the employ of the defendant Bell, alleging that the defendant Bell had absented himself from the Commonwealth and before doing so had placed in the hands of the defendant Bolster as his attorney a policy of insurance issued by the defendant London Guarantee and Accident Company, made a party by amendment, insuring the defendant Bell against loss by reason of such accidents as that which caused the plaintiff's injuries, praying that the defendants should be restrained from selling or assigning the policy of insurance, that a receiver should be appointed to take possession of the policy and collect it from the defendant insurance company, and that the proceeds when collected should be applied to the payment of the plaintiff's judgment, the plaintiff by the amendment to his bill offering, if payment of the plaintiff's judgment by the defendant Bell should be held to be a condition precedent to the collection of the policy by Bell or the receiver, to cause to be advanced to the receiver sufficient funds to pay the plaintiff's judgment, to be repaid out of the proceeds of the collection from the defendant insurance company.

The defendant insurance company demurred to the bill as

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amended. The Superior Court made a final decree sustaining the demurrer and dismissing the bill; and the plaintiff appealed.

E. M. Brooks, for the plaintiff.

C. S. Knowles, for the defendant insurance company.

LORING, J. The plaintiff contends that he is entitled to maintain this bill to reach and apply the debt due from the insurance company to his employer Bell, first, on the ground that on the true construction of the policy the insurance company is indebted at law to his employer in the amount of the judgment which he has recovered against him, and secondly, that if the debt is not due at law his employer has a right in equity to maintain a bill against him for exoneration and to compel the company to satisfy the judgment directly.

On the first ground the plaintiff relies on the case of *Sanders* v. *Frankfort Ins. Co.* 72 N. H. 485. In that case relief was given under similar circumstances, on the ground that as matter of construction of a policy having the same terms, payment of a judgment by the assured was not a condition precedent to a right of action on the policy where the insurance company had undertaken the defence of the claim.

By the policy here under discussion, in substance the same as that construed by the court in *Sanders* v. *Frankfort Ins. Co.*, the company "agrees to indemnify" the assured "against loss from common law or statutory liability for damages on account of bodily injuries" to employees, caused by the negligence of the assured "subject to the following special and general agreements."

The second, third and eighth clauses of the general agreements are the material ones. The second and third and the material part of the eighth clauses are as follows:

"2. If thereafter, any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy immediate notice thereof shall be given to the company, and the company will defend against such proceeding, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay to the assured the indemnity provided for in clause A of special agreements as limited therein.

"3. The assured shall not settle any claim, except at his own

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cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information and evidence and in effecting settlement, and in case the company calls for the attendance of any employee or employees as witnesses at inquests and in suits the assured will secure his or their attendance making no charge for his or their loss of time."

"8. No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

The conclusion that payment of the judgment recovered by the employee was not a condition precedent to an action on the policy was reached in *Sanders* v. *Frankfort Ins. Co.* on these grounds: The word "defend" in the second clause means to protect and secure against attack, "in short, to successfully defend," and therefore included an obligation on the part of the company to pay the judgment, if the case defended resulted in a judgment against the assured; that the second clause of the general agreements, so construed, was not consistent with the eighth clause of the general agreements, which stipulates in terms that "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue"; that if the eighth clause is construed to cover cases of which the insurance company has assumed the defence, it is inconsistent with the second clause so construed, and consequently the eighth clause must be construed not to cover those cases but to be confined to cases of which the insurance company has not assumed the defence.

We are of opinion, however, in the first place, that the word "defend" in the second clause is to have its natural import; that it means here what it means when counsel are retained to defend an action, and that it is not to be extended beyond that and to mean to "successfully defend."

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In the second place, the second clause is an obligation in addition to the obligation to indemnify the assured against loss like the suing and laboring clause in a marine policy, (as to which see *Kidston* v. *Empire Ins. Co.* L. R. 1 C. P. 535; 2 C. P. 357; *Atchison* v. *Lohre*, 4 App. Cas. 755; *Johnston* v. *Salvage Association*, 19 Q. B. D. 458,) and not a clause qualifying the main obligation of the policy to "indemnify" against loss from liability for damages on account of bodily injuries to employees caused by negligence of the assured. The object of this second clause is plain when taken in connection with the third. It is plainly inserted as an additional obligation and privilege for the protection of the insurance company, on the assumption that it is for the pecuniary interest of the company to be given the conduct of and to defend the action which is to fix its liability and the amount to be paid when liable, rather than to leave that matter to be dealt with by the several persons insured, respectively. This does not result in the necessity of writing into clause two the qualifying words "until final judgment," as the plaintiff contends, for when final judgment is rendered ordinarily all defence is at an end. Nothing remains but a writ of review or a writ of error, and if such a proceeding were necessary it might well be held to be covered by the obligation to defend. But when the defence is ended and in spite of the defence judgment is rendered against the insured, there is nothing to do but pay. Making payment of a judgment against the defendant is no part of a covenant to defend the action. Whether the insurance company is bound to pay the judgment depends upon the terms of its agreement to indemnify the assured against loss, and the eighth clause in terms provides that no action shall lie for "any loss under this policy" unless brought by the assured "to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." In the case at bar Bell has not paid the judgment recovered by the plaintiff, and therefore has no claim against the insurance company. *O'Connell* v. *New York, New Haven, & Hartford Railroad*, *post*, 272. Similar policies have received the same construction in *Frye* v. *Bath Gas & Electric Co.* 97 Maine, 241; *Cushman* v. *Carbondale Fuel Co.* 122 Iowa, 656. It was also adopted in the case of *Travellers Ins. Co.* v. *Moses*, 18 Dick. 260, where it was held that an assignment of the property of the insured in bankruptcy was payment.

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We add, only because the plaintiff has argued to the contrary, that the policy here in question is not to be construed in the same way as a policy which insures against the liability of the employer and does not contain clause eight of the general agreements. For that reason the following cases are to be distinguished from that now before us: *Stephens* v. *Pennsylvania Casualty Co.* 135 Mich. 000; *Fritchie* v. *Miller's Pennsylvania Extract Co.* 197 Penn. St. 401; *Hoven* v. *Employers' Liability Assur. Co.* 93 Wis. 201; *Anoka Lumber Co.* v. *Fidelity & Casualty Co.* 63 Minn. 286; *American Employers' Liability Ins. Co.* v. *Fordyce*, 62 Ark. 562; *Fenton* v. *Fidelity & Casualty Co.* 36 Ore. 283; *Pickett* v. *Fidelity & Casualty Co.* 60 S. C. 477.

For the same reason it is necessary to point out that to pay a judgment under clause two is not to "settle any claim" within clause three, and so there is no inconsistency between the two clauses.

It is proper to point out that if the plaintiff had been right in his construction of the policy his remedy would have been to attach the debt due by trustee process in an action at law.

No argument has been made in support of the second contention stated in the plaintiff's brief.* It however is dealt with in *O'Connell* v. *New York, New Haven, & Hartford Railroad, post*, 272. The contention cannot be sustained.

It remains to speak of the plaintiff's prayer to have a receiver appointed to pay the judgment due the plaintiff, and so complete Bell's right against the defendant. The statute authorizing a plaintiff to reach and apply (R. L. c. 159, § 3, cl. 7) deals with the defendant's property which cannot be attached at law. It is not a statute authorizing the court to complete inchoate rights so as to create property which then could be the subject of trustee process in an action at law.

Decree affirmed.

* The contention referred to was that at the end of the following sentence: "We submit that under the terms of the policy the employer, after a final judgment has been rendered against him, has a right to recover the amount of that judgment from the company before he himself has satisfied it, or (2) that, at least, he can maintain against the company a bill for exoneration and compel the company to satisfy the judgment directly."

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JOSEPH P. O'CONNELL & others *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & another.

Suffolk. November 30, 1904. — January 6, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Insurance, Against liability. *Waiver*. *Contract*, Condition precedent. *Equity Jurisdiction*, To enforce contract of indemnity.

Even if a company insuring against liability for bodily injuries caused by the negligence of the insured after taking upon itself the defence of an action for bodily injuries alleged thus to have been caused is precluded from asserting that the case is one not covered by the policy, it is not precluded from refusing to pay the insurance money before the insured has paid the judgment in the action for bodily injuries, if the policy makes this a condition precedent to liability.

If a policy, insuring a contractor against liability for bodily injuries suffered by persons not employed by him caused by the negligence of the insured and resulting from the operation of his trade or business, contains a provision that no action shall lie against the company on the policy unless it shall be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue, there is no liability of the insurance company by reason of a judgment obtained against a third person in an action defended by the insurance company for bodily injuries caused by the negligence of the insured, if the judgment has been paid by the third person and the insured although he has given a bond of indemnity to the third person has not paid the amount of the judgment.

Equity will not enforce a contract of indemnity where the party seeking to enforce it has not performed an act which by the terms of the contract is made a condition precedent to the indemnifier's liability.

BILL IN EQUITY, filed February 25, 1902, by the principal and sureties on a bond of indemnity given by the first named plaintiff to the New York, New Haven, and Hartford Railroad Company, against that railroad company and the Union Casualty and Surety Company, to restrain the defendant railroad company from the further prosecution of an action against the plaintiffs on the bond of indemnity and also of an action of tort against the first named plaintiff, and to compel the defendant insurance company to pay to the defendant railroad company all sums which the defendant railroad company properly had paid in consequence of a judgment obtained against it by one O'Leary.

In the Superior Court the case was heard by *Richardson*, J., who made certain findings, the material portions of which are

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quoted later in the statement of the case taken from the opinion of the court. The judge made a decree for the plaintiffs granting the relief prayed for; and the defendants appealed.

The policy mentioned in the opinion issued by the defendant insurance company to the first named plaintiff contained the following heading:

"Against Loss from Common Law or Statutory Liability.

"For damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons not employed by the assured at or about any of the work of the assured, described in the application, caused by the negligence of the assured and resulting from the operation of the trade or business described in the said application. Provided, however, that": [Here followed certain special agreements.]

The policy among other provisions contained the following:

"This insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract: —

"1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing with full particulars to the home office of the company, at St. Louis, Mo., or to its duly authorized agent. He shall give like notices, with full particulars of any claim which may be made on account of such accident.

"2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend against such proceeding, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in Clause 'A' of Special Agreements as limited therein."

"8. No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages, unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the

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company by the assured within thirty days after final judgment has been rendered and satisfied as above. In no case, except that of minors, shall any action lie against the company after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this clause any defences to such action which it may be entitled to make under this policy."

The following statement of the case is taken from the opinion of the court.

The facts which gave rise to the filing of the bill were as follows: The plaintiff O'Connell was a contractor, and at the time in question was engaged in building a section of Stony Brook conduit for the city of Boston, near the tracks of the defendant railroad company. In carrying on this work it became necessary to set up one of the guys of a derrick across the tracks of the defendant railroad company, and on application being made to it, a license so to do was given to the plaintiff by it. The guy was set up too low, and in consequence two of the defendant railroad company's brakemen were injured while riding on the top of freight cars. These accidents occurred on December 17, 1897. On the twenty-eighth day of that month, the plaintiff O'Connell gave the company a bond with two sureties in the penal sum of $1,000, conditioned to save it harmless from all loss by reason of the injuries, in order to prevent the revocation of the license to maintain the guy. On the eighteenth day of the following January, one of the brakemen, O'Leary, took out of the United States Circuit Court a writ against the railroad company, with an *ad damnum* of $6,000. Some two months later, O'Connell discovered that the accident policy which had been issued to him by the defendant surety company covered "bodily injuries . . . accidentally suffered by any person or persons not employed" by him, caused by his negligence, as well as those "suffered by any employee or employees." He thereupon notified the surety company of the action brought by O'Leary against the railroad company, and on April 9, in spite of the notice not having been given within the time stipulated for in the policy, the surety company wrote to O'Connell's attorney a letter, in which, after referring to the action of O'Leary against the railroad company, "for which it is probable that Mr. O'Con-

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nell is responsible," they state: "Mr. O'Connell has since found that he held a liability policy with this company under which we will take charge of this particular case when we succeed in getting full information as to the status of the case at the present time." The information was furnished, and an attorney retained by the surety company entered an appearance for the railroad company and tried the action for it in the following June. The trial resulted in a verdict for the plaintiff in the sum of $3,625. Exceptions were taken by the defendant which the attorney retained by the surety company desired to take to the Circuit Court of Appeals. To enable him to do this he asked the railroad company to give a bond. This the railroad company refused to do unless a bond was given to it, conditioned for the payment of any judgment and costs and expenses incurred by it in the action. The attorney retained by the surety company then asked O'Connell or his attorney to give such a bond to the railroad company, and such a bond in the penal sum of $5,000 was given by O'Connell and two sureties, on October 24, 1898. The plaintiff O'Connell and his attorney testified that the attorney retained by the surety company and its general manager and the claims attorney promised O'Connell that if he would give the bond to the railroad company the surety company would pay the judgment recovered by O'Leary against the railroad company, if judgment was ultimately rendered in his favor. The attorney who tried the action brought by O'Leary against the railroad company under the surety company's retainer testified that when O'Connell's attorney asked him if the surety company would stand behind O'Connell on the bond if he gave the bond asked for, he answered that he did not "know about that," and that O'Connell, his attorney and the witness then went to the office of the surety company, where they found the general manager and claims attorney; that the plaintiff O'Connell's attorney then asked them the question previously asked by him of the witness, and that the general manager or the claims attorney answered "in some form of words" that they "thought that as the company had undertaken the defence there was no doubt that the company would pay." This testimony was corroborated by the claims attorney. The plaintiffs also introduced evidence that the railroad company agreed to look to the surety company for the performance of the

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condition of the bond given by him to the railroad company, and not to the principal and sureties who signed it. This was denied by the railroad company. The bond was given, the exceptions were argued and overruled, and execution issued against the railroad company in May, 1899. On May 25, 1899, the railroad company paid on the execution the sum of $3,978.07. On the fifth day of the following October the surety company's agent in Massachusetts wrote to O'Connell's attorney that the surety company "takes the position that it is not liable to Mr. O'Connell on his policy with that company." On the following day the railroad company put the $5,000 bond in suit, and on the thirteenth day of the following December it put the $1,000 bond in suit and brought a common law action of negligence against O'Connell. The cases being on the short list for trial in the Superior Court on February 25, 1902, the bill now before the court was filed. This bill counts on the surety company's agreement to pay the judgment recovered by O'Leary against the railroad company and to look to the surety company for the performance of the condition of the $5,000 bond. The prayer of the bill is that the railroad company be restrained from further prosecuting the action brought by it against O'Connell and the sureties on the two bonds, and the other action brought by it against O'Connell, and that the surety company be ordered to pay to the railroad company all sums paid by it to O'Leary. A hearing was had on the merits, the evidence was taken by a commissioner, and a final decree was made in favor of the plaintiff, from which the defendant surety company took an appeal.

The following findings were made by the judge who heard the suit: "In addition to other facts not in dispute, I find that from the time the defendant Union Casualty and Surety Company assumed the defence of the action of O'Leary *v.* The New York, New Haven & Hartford Railroad Company, on March 19, 1898, which it did at its own request, and employed Mr. Proctor to defend that action, it was the general understanding between the said Union Casualty and Surety Company, Mr. O'Connell and said railroad company (parties to the bill), that the accident to O'Leary was one for which, directly or indirectly, O'Connell was liable, and so that it was one for which the said Union Casualty and Surety Company was liable to indemnify O'Connell under

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its policy to him; and it was the general understanding between them that the said Union Casualty and Surety Company took up the defence of the O'Leary case because of its own supposed ultimate liability to O'Connell if there should be a verdict and judgment against the New York, New Haven and Hartford Railroad Company in said suit of O'Leary against the said railroad company, and that the said Union Casualty and Surety Company, by virtue of its policy to O'Connell, intended to and would protect and hold O'Connell harmless against loss or damage by reason of said accident to O'Leary; and this general understanding existed down to the letter of October 5, 1899, . . . during which time the conduct of the three parties was consonant with this understanding. The bond of O'Connell for $5,000 to the railroad was given at the request of the Union Casualty and Surety Company, in order that it might take the case of O'Leary *v.* The New York, New Haven & Hartford Railroad Company, on writ of error to the Circuit Court of Appeals, which the said Union Casualty and Surety Company desired to do or to have done.

"I do not find that Mr. Proctor, at the time said $5,000 bond was given, in express terms agreed with or to Mr. Cronan or Mr. O'Connell, if O'Connell would give that bond that the Union Casualty and Surety Company would save O'Connell harmless or pay whatever sum he had to pay to the railroad company by reason of it, or would hold him harmless on such bond with any intention thereby to create any new obligation of the Union Casualty and Surety Company to O'Connell; yet at that time, as before, I think and find that the general understanding among all the parties was, as before stated, that the Union Casualty and Surety Company would indemnify, protect and save O'Connell harmless against loss or damage in respect to it, and all parties acted upon that understanding down to the letter of October 5, 1899."

F. A. Farnham, for the New York, New Haven, and Hartford Railroad Company.

R. W. Nason, for the Union Casualty and Surety Company.

G. R. Swasey, for the plaintiffs.

LORING, J. [After the foregoing statement of the case.] We are of opinion that the decree in favor of the plaintiffs must be reversed.

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The judge has found that neither of the two promises counted on in the bill now before us was in fact made, and the plaintiffs have not undertaken to overturn that finding of fact.

What the plaintiffs have contended for here is that the final decree can be justified on the ground that under the findings made below the surety company is estopped to set up the defence set up by it. But the policy issued by the surety company to O'Connell is in the same form as that under consideration in *Connolly* v. *Bolster*, *ante*, 266, and under the decision in that case payment of the O'Leary judgment by O'Connell is a condition precedent to an action on the policy. If, therefore, we assume in favor of the plaintiffs (without making a decision to that effect) that after the defendant surety company had taken on itself the defence of the action it was precluded from afterwards taking the position that the case was not one covered by the policy, still the plaintiffs have not made out a case here, because the plaintiff O'Connell has not paid the judgment entered in the action defended by the surety company.

There is nothing in the finding of the judge which amounts to a waiver of this condition precedent to the defendant surety company's liability. To create a waiver there must be some act inconsistent with the right waived. There is nothing found here or in the evidence on which that finding was made inconsistent with a determination from the beginning on the part of the surety company to insist that when the time came for payment under the policy payment should be made in accordance with the terms of the policy and on no other terms; that is to say to pay when O'Connell had paid the judgment in the action which the company had tried, and which for that reason it was estopped to say was not an action fixing its obligation under the policy.

The difficulty is not avoided by *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, and the other cases cited by the defendants. The doctrine of those cases is that while one holding a covenant of indemnity or one who has a right to contribution cannot sue at law until he has paid, he can maintain a bill in equity to compel the covenantor or person bound to contribute to make payment directly to the creditor. But the doctrine of those cases is that equity will compel specific performance of the obligation due from the defendant. It is a relief given in case of general

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covenants of indemnity, as Mr. Justice Story states it. Story, Eq. Jur. § 850. Such a bill cannot be maintained where the plaintiff has not performed a covenant which by the express terms of the contract which he asks to have specifically performed is a condition precedent to any liability on the part of the defendant. In such a case the party to be indemnified is not in a position to ask for specific performance of the contract of indemnity.

Decree reversed; decree of bill dismissed to be entered.

PATRICK TOBIN *vs.* MARIA LARKIN & another.

Essex. November 2, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Partition. Judgment. Probate Court. Lis Pendens.

Whether the provision of R. L. c. 184, § 4, that a petition for partition shall set forth the rights and titles "of all persons interested who would be bound by the partition, stating whether they have an estate of inheritance, for life or for years, whether in possession, remainder or reversion, and whether vested or contingent," requires a petitioner who owns one twelfth of the real estate which is the subject of the petition to set forth the interest of one who has obtained a decree for the specific performance of a contract ordering the owners of the other eleven twelfths of the property to convey their shares to him, so that notice of the petition shall be given to the holder of such decree, *quære.*

A decree of the Probate Court within its jurisdiction is good until set aside and cannot be attacked collaterally.

Mere knowledge by a purchaser of land sold under a decree of partition in accordance with the provisions of R. L. c. 184, § 47, that a suit is pending in which the plaintiff has obtained a decree for the specific performance of a contract by the conveyance of the land to him by the owners in common other than the petitioner for partition, does not invalidate the partition sale so long as the decree of the Probate Court ordering it remains unrevoked, and if the holder of the decree in equity desires to set aside the sale on the ground that he had no notice of the partition proceedings, his remedy, if he has any, is to apply to the Probate Court for a revocation of the decree.

SUPPLEMENTAL BILL IN EQUITY, filed January 3, 1903, to enforce a decree obtained against all the owners in common of certain land in Lawrence other than one Martin Larkin, in a

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suit for the specific performance of a contract to convey the land to the plaintiff, in accordance with the decision of this court reported in 183 Mass. 389, in spite of a sale of the land in question to the defendant Patrick J. Lynch on a petition for partition filed by Martin Larkin, as described in the opinion of the court.

The defendants demurred. In the Superior Court *Holmes*, J. overruled the demurrer and made a decree for the plaintiff granting the relief prayed for as stated in the opinion. The defendants appealed.

W. S. Knox & W. Coulson, for Maria Larkin.

J. J. Mahoney, for Patrick J. Lynch.

J. P. Sweeney, for the plaintiff.

KNOWLTON, C. J. The plaintiff brought a bill in equity against Maria Larkin, Bridget Larkin and Martin Larkin, praying for a decree of specific performance of a contract for the sale of real estate. At the hearing it appeared that Martin Larkin owned one twelfth of the estate, and that his two sisters, the other defendants, owned eleven twelfths of it. The bill was sustained as to the two female defendants for their share of the property, and dismissed as to the other defendant. Pending an appeal by the female defendants, Bridget Larkin died. The defendant Martin Larkin began proceedings in the Probate Court for a partition of the property, and without notice to the plaintiff obtained an order for a sale of it for the purpose of partition. Pursuant to a warrant from that court, a sale was made to Patrick J. Lynch, who is one of the defendants in this supplemental bill. He took possession, and now has a record title to the land. A rescript was sent from this court on the appeal in the first suit, affirming the decree for specific performance. See *Tobin* v. *Larkin*, 183 Mass. 389.

The plaintiff avers that at about the time of the filing of the original bill a notice of *lis pendens* was filed in the registry of deeds, and further avers that, in addition to this constructive notice, Lynch as well as the other defendants in the original suit had actual notice of the litigation. He also says that he had no notice of the proceedings for partition until after the sale, and that the advertisement of sale was purposely framed and published in a manner to afford him no notice, and with the intent to

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evade the decree on the original bill. The plaintiff prays that he may have the benefit of the original suit and the proceedings under it, as against the defendant Lynch, and that the order for a decree in the original case "may be carried into execution between the parties to this suit as between the parties to the said original cause," and for other relief. The defendants filed a demurrer which was overruled, and a decree was entered for the plaintiff that, upon the payment or tender of a specific sum to the defendants or either of them, or to their attorneys of record or either of them, they should execute and deliver to the plaintiff a quitclaim deed of the premises, free from incumbrances made or suffered by them or either of them, and that the plaintiff should be allowed his costs. From the decree overruling the demurrer, and from the final decree, the defendants appealed.

If the purpose of this bill is to establish the right of the plaintiff to have his share of the proceeds of the sale upon the payment of the sum due under the contract, it is plain that he is entitled to the relief sought. But we infer from the statement, the language of the prayer, from the decree and from the arguments before us, that he desires to set aside the sale, and to have his share of the property without regard to the proceedings for partition. In this view the question is whether the bill states facts that entitle him to this relief.

Martin Larkin, who is not joined in this supplemental bill, had a right to have a partition which should give him his share in severalty. *O'Brien* v. *Mahoney*, 179 Mass. 200. The notice of *lis pendens* and his actual knowledge of the pending litigation did not deprive him of this right. He brought his petition for partition, and if all the proceedings had been regular, the judgment for partition and for a sale under the R. L. c. 184, § 47, because the land could not be advantageously divided, would have been "conclusive as to the rights of property and possession of parties and privies to the judgment, including all persons who might by law have appeared and answered," with certain exceptions which are immaterial to this case. R. L. c. 184, § 22. *Foster* v. *Abbot*, 8 Met. 596. *Hathaway* v. *Thayer*, 8 Allen, 421. Section 47 of this chapter, which relates to sales where the land cannot be advantageously divided, declares that "the conveyance shall be conclusive against all parties to the proceedings for par-

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tition and those claiming under them." This plaintiff therefore is bound by the proceedings unless there is ground for setting them aside. By § 4 of this chapter it is provided that "The petition shall set forth the rights and titles, so far as known to the petitioner, of all persons interested who would be bound by the partition, stating whether they have an estate of inheritance, for life or for years, whether in possession, remainder or reversion, and whether vested or contingent. If the petitioner holds an estate for life or years, the remainderman or reversioner shall be so interested and shall be entitled to notice." It is a question not free from difficulty whether the petitioner is one of the "persons interested who would be bound by the partition," within the meaning of this section. If the provision in the statute for a statement by the petitioner in regard to the nature of the estate describes in terms every kind of interest that will be bound by the partition and that should be set forth in it, then plainly the plaintiff is not a person interested within the meaning of the section. He is an equitable owner of eleven twelfths of the property, subject to a liability to pay the contract price, and his claim is adverse to the holders of the record title. If such an owner is not a person interested within the meaning of the statute, the decree of the Probate Court, so far as appears, was obtained regularly. If he is a person interested, it was the duty of the petitioner for partition, who knew of the plaintiff's relation to the property, to set it forth in the petition so that notice should be given to him under the next section. If the failure of the petitioner to do this was an irregularity in the proceedings in the Probate Court, can it be taken advantage of in this suit?

A decree of the Probate Court within its jurisdiction is good unless it is set aside, and it cannot be attacked collaterally. *Gale* v. *Nickerson*, 144 Mass. 415. *Tucker* v. *Fisk*, 154 Mass. 574. *Harris* v. *Starkey*, 176 Mass. 445. *McCooey* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 205. The sale under the decree for partition was legal and binding. Mere knowledge by the purchaser of the pending litigation in equity does not invalidate his purchase, so long as the decree for sale remains unrevoked. *Foster* v. *Abbot*, 8 Met. 596. If the plaintiff desires to set aside the sale, his remedy, if he has any, is to apply to the Probate Court to revoke the decree as obtained without notice

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to him, through the failure of the petitioner to perform the duty imposed upon him by the statute. Whether the facts will entitle him to such a revocation is a question not now before us. If the decree ought to be revoked as against the petitioner Martin Larkin, the question then will arise whether the knowledge of the defendant Lynch charges him with equities so far that his purchase makes no difference with the plaintiff's rights, and that therefore revocation will be ordered as if no sale had been made. This will be a question for the Probate Court, which here we cannot attempt to decide.

The bill states that "the advertisement of said sale was purposely and designedly framed and published in such a manner as to afford the plaintiff no notice of said proceedings and sale in partition, and with the intent to evade the decree on said original bill." But there is no averment that the defendant Lynch was a party to this wrong, or had any knowledge of it. As against him it does not warrant us in treating the sale as void on the ground of fraud. Unless the sale is set aside in connection with the revocation of the decree of the Probate Court, or in some other way, Lynch will be entitled to retain the benefits of his bargain.

The decree of the Superior Court should be reversed, and, upon the interpretation given to the bill by the parties, the demurrer should be sustained.

So ordered.

WALTER C. TOWNSEND *vs.* CITY OF BOSTON.

Suffolk. November 11, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Carrier. Municipal Corporations. Boston.

A city operating a ferryboat as a carrier of passengers and their property for hire can be found liable for injuries to a passenger and his horse and wagon caused by a large wagon with a heavy load drawn by two horses sliding backward into the plaintiff's team down a drop one hundred and fifteen feet long leading up a steep incline to the wharf at the place of landing, if it appears, that there was a motor with a gearing in a large headhouse there which often was used to help heavy teams up the drop and was used after the accident to draw up the load

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which slid back, and if the superintendent of ferries testifies that it was the custom for deck hands to follow the teams and "chock" them, that is, to be ready to block them in case they should roll back or get stuck on the drop, and that blocks laid at the end of the boat were provided for that purpose, and if it also appears that the driver of the heavy team called out to one of the deck hands to "block" him as he started up the drop.

A city operating a ferryboat as a carrier of passengers and their property for hire is liable for injuries to a passenger and his horse and wagon caused by the neglect of its agents or servants to make reasonable provision for the passage of teams from the ferryboat to the wharf at the place of landing, even if the negligence of a third person contributed to the injuries.

Whether a passenger on a ferryboat is in the exercise of due care in starting with his horse and wagon up a steep drop leading to the landing place when a heavy team is two thirds or three quarters of the distance up the drop and more than fifty feet ahead of him, and he sees a deck hand standing there whose duty it is to "block" teams going up the drop and who has been asked by the driver of the heavy team ahead to "block" him and attempts to do so when it is too late, is a question of fact for the jury.

TORT for injuries to the plaintiff and his horse and wagon while a passenger on a ferryboat operated by the defendant as a carrier of passengers and their property for hire caused by the alleged negligence of the defendant in failing to block the wheels of a heavy team ahead of the plaintiff on the drop of the defendant's slip at that part of Boston called East Boston, in consequence of which the heavy team backed down upon the plaintiff, causing the injuries. Writ in the Municipal Court of the City of Boston, dated April 8, 1901.

On appeal to the Superior Court the case was tried before *Fox*, J., who ordered a verdict for the defendant. The plaintiff alleged exceptions.

E. S. Townsend, for the plaintiff.

S. M. Child, for the defendant.

KNOWLTON, C. J. The plaintiff was a passenger, with his horse and wagon, upon a ferryboat crossing from Boston to East Boston on October 24, 1900. The ferry is owned and operated by the city of Boston, which purchased it of the East Boston Ferry Company under the St. 1869, c. 155, and with it the franchise of the corporation. The bill of exceptions says: "It was admitted that the city of Boston was a common carrier of passengers and their property for hire across said ferry." It was proved that tolls were charged for carrying passengers. Under this statute the city could maintain and operate a ferry, in part for profit, and be subject to all the liabilities of a com-

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mon carrier, although there is alternative authority to use it otherwise. In the absence of other proof in regard to the use and management of the ferry by the city, we must, under the admission above quoted, hold the city subject to the ordinary duties and liabilities of a common carrier.

A little in front of the plaintiff's horse on the boat was a large wagon drawn by two horses, containing a load of five tons of fish. The tide was very low, and on reaching East Boston, a drop one hundred and fifteen feet long was let down upon the boat, up which there was a steep ascent to the wharf. This heavy team started up the drop, and when it had gone about two thirds or three quarters of the distance, the horses stopped, and the wagon soon ran back and collided with the plaintiff's horse which was following. This suit was brought to recover damages for the consequent injuries. The judge directed a verdict for the defendant, in part, as we understand, on the ground that the city owed the plaintiff no duty to make provision against the running back of the team in front of him, and in part on the ground that he was not in the exercise of due care.

It was testified that there was a motor with gearing in a large headhouse there, that often was used to help heavy teams up the drop, which at low tide was very steep, and that was used to draw up this load of fish after the accident. The superintendent of ferries also testified that it was a custom and practically the rule for deck hands to follow the teams and to "chock" them, that is, be ready to "block" them in case they should roll back or get stuck on the drop. He also said that blocks laid at the end of the boat are provided for that purpose. There was testimony that the driver of the fish team called out to Donovan, one of the deck hands, to "block" him, as he started up the drop, and the jury might have found that there was negligence on the part of the deck hands in failing properly to do this.

We have no doubt that it was the duty of the city, as a common carrier for hire, upon the facts stated in the bill of exceptions, to make reasonable provision for passage from the boat to the wharf by teams, and we are of opinion that it was a question for the jury whether the defendant's agents or servants neglected this duty. If the defendant's negligence was a direct and

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proximate cause of the accident the defendant is liable, even if the negligence of a third person contributed to the injury.

We also are of opinion that it was a question for the jury whether the plaintiff was in the exercise of due care. According to the testimony he did not start his horse until the other team had got two thirds or three quarters of the distance up the drop, and he was stopping fully fifty feet behind the fish team when it began to roll back. Other teams were crowding up behind him. As he started to go up he saw Donovan, who had been asked to "block" the team, standing there, and Donovan afterwards, according to the testimony, got a small block and attempted to do it when it was too late.

We are of opinion that the evidence should have been submitted to the jury.

Exceptions sustained.

CITY OF BOSTON *vs.* SUMNER J. BROOKS.

Suffolk. November 16, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Judgment. Practice, Civil, Agreed statement of facts.

A judgment for the plaintiff in an action against a city for an alleged defect in a highway has no force or effect against a person who originally was joined as a defendant in the action and against whom it afterwards was discontinued, and the city after having paid the judgment cannot make use of it to recover the amount paid from the person who originally was a joint defendant.

Upon an agreed statement of facts in which no power to draw inferences is given the judgment must be for the defendant unless the facts stated show a liability to the plaintiff as matter of law.

KNOWLTON, C. J. This is an action brought to recover the amount of a judgment recovered against the city of Boston on account of a defect in a street, alleged to have been caused by the defendant. The original action was brought against the present defendant and the city of Boston, jointly, and both appeared to defend the suit. On demurrer by the city it was held that the plaintiff could not maintain her action against the two defendants jointly, and thereupon she elected to proceed against

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the city alone, and discontinued the action against this defendant. This defendant then withdrew from the case and took no further part in it. He was not notified nor requested to continue in the defence, and the city alone defended.

His original appearance must be assumed to have been as a party mentioned in the writ, and after the discontinuance against him the case took a new form which on its face did not directly concern him. In the absence of any request or notice from the city, he was not called upon to defend the action in its changed form, as he would not have been if it originally had been brought in that form. The present action, therefore, stands precisely as it would have stood if the original action had been brought against the city alone, and it follows that the judgment has no force or effect against this defendant, who was not a party to it.

As the case comes up by report on an agreed statement of facts, the judgment must be for the defendant, unless the facts show a liability to the plaintiff as matter of law. Upon an agreement in this form, no inferences can be drawn. *Mayhew* v. *Durfee*, 138 Mass. 584. *Kenerson* v. *Colgan*, 164 Mass. 166. *Schwarz* v. *Boston*, 151 Mass. 226. *Webber* v. *Cambridgeport Savings Bank*, 186 Mass. 314.

The statement does not show that there is a cause of action. The plaintiff concedes that there is no liability under the ordinance which is embodied in the agreement, and we need not consider it. Upon the facts stated it cannot be said as a matter of law that there was a defect in the street for which either the city or the defendant was liable. There is nothing to show whether the original plaintiff was or was not in the exercise of due care. In accordance with the terms of the report, the entry must be,

Judgment for the defendant.

A. L. Spring, for the plaintiff.

F. Hunt, for the defendant.

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COMMONWEALTH *vs.* AFCIN LOBEL.

Suffolk. November 16, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Practice, Criminal, Revision of sentence. *Superior Court.*

When the sentence in a criminal case is stayed under R. L. c. 220, § 8, to await a decision upon exceptions, the overruling of the exceptions does not end the case, which remains in court for further action to enforce the sentence, and when the case comes up for such action the trial court has power to revise its sentence, although such a revision should not be granted except for the purpose of correcting a manifest error of law or fact.

INDICTMENT FOR LIBEL, found and returned on October 11, 1902.

In the Superior Court the defendant was tried before *Bond*, J., and the jury returned a verdict of guilty. The subsequent proceedings are stated in the opinion.

S. R. Cutler & H. W. James, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

KNOWLTON, C. J. The defendant was tried in the Superior Court and found guilty of a criminal offence, and exceptions were taken to rulings made at the trial. Afterwards he was sentenced, and execution of the sentence was stayed upon motion by an order of the court, before any part of it had been executed. The exceptions were entered in this court, but afterwards were waived, and thereupon a rescript was sent to the Superior Court accordingly. The defendant then filed a motion for revision of the sentence, which motion was denied on the ground that the court had no power to grant it. An exception to this ruling presents the only question before us.

The case of *Commonwealth* v. *O'Brien*, 175 Mass. 37, goes far towards a determination of this question. It was held in that case, after the disposition of the exceptions in this court, when the case came before the Superior Court for an order vacating the original order staying the execution of the sentence, that it was in the power of the Superior Court to revise the sentence for the correction of an error of law. The case of *Commonwealth*

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v. *Hayes*, 170 Mass. 16, was considered, and limited to the precise point decided in it. It was said that, "the power of the court to deal with the sentence whenever the exceptions are overruled, so far as to vacate the order staying execution, and to direct the execution of it, impliedly includes the power to correct any illegality or error in a sentence, provided it then remains wholly unexecuted." There is no good ground for a distinction between the power to correct an error of law and the power to correct an error of fact. Under the statute which makes it the duty of the court in criminal cases to impose a sentence after a verdict of guilty, notwithstanding exceptions, the imposition of a sentence in a case in which exceptions are pending is not a final decision of the case, as the imposition of a sentence was under the former law, in a case in which there were no exceptions. Formerly a prisoner could not be sentenced so long as exceptions remained undisposed of, and when a case was ripe for a sentence and the sentence was imposed, and the term of the court was ended, the case was finally ended, and could not be revived unless upon a writ of error or some other new proceeding. But when a sentence is stayed under the R. L. c. 220, § 3, to await a decision upon exceptions, the case is not ended, but remains in the court for further action that shall put the sentence into execution if the exceptions are overruled. When the case comes up for further proceedings, there is nothing in the law that prevents the court from correcting errors of law or errors of fact which enter into a sentence no part of which has been executed.

It would not be proper for a court, when called upon to vacate an order staying a sentence, to entertain a motion for a revision of the sentence, unless cogent reasons are given for opening a matter which has been regularly, and, under ordinary circumstances, finally disposed of. An application for such a revision is like a motion for a new trial, and should not be granted except for manifest errors, like those which will justify an order for a new trial in an ordinary case. But it would be too strict a rule, when the case is before the court to obtain an order for the execution of the sentence, to hold that the court has no power to revise its own order, to correct a manifest error and to prevent injustice. *Exceptions sustained.*

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WINSLOW WARREN, trustee, *vs.* STREET COMMISSIONERS OF THE CITY OF BOSTON.

EBEN D. JORDAN & others, trustees, *vs.* SAME.

Suffolk. November 18, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & BARKER, JJ.

Tax. Constitutional Law. Boston.

The Legislature may authorize the re-assessment of a betterment tax if the original assessment has failed because of informality or other defect.

The assessment of betterments, if other necessary conditions exist, may be authorized by the Legislature as well after as before the expenditure is incurred.

St. 1902, c. 527, authorizing assessments of betterments to be made within one year after the passage of the act for certain public improvements in Boston completed by that city within six years before the passage of the act, is constitutional, and was enacted to enable the city to assess betterments in cases where on account of the unconstitutionality of previous statutes or of illegality in the proceedings under them a valid assessment otherwise could not be made; therefore it includes authority to assess betterments for expenditures in the construction of Huntington Avenue which were illegal when incurred.

St. 1902, c. 527, authorizing the re-assessment of betterments for certain improvements in Boston for which the previous assessments had been invalid by reason of unconstitutionality of statutes or of illegality in incurring the expenditures for which the assessments were made, is not unconstitutional on account of its provision exempting from such assessment the estates of owners who voluntarily have paid former invalid assessments in full and cannot recover them back, because under this statute only an amount not exceeding one half of the expenses incurred for the improvement can be assessed, and the Legislature is presumed to have assumed that all previous invalid assessments that had been paid in full without protest were greater than could be assessed under the present statute and therefore that the owners of other estates cannot suffer from their exemption.

KNOWLTON, C. J. These are petitions for a writ of certiorari to quash the proceedings of the street commissioners of Boston in assessing betterments under the St. 1902, c. 527, for the laying out, extension and construction of Huntington Avenue. Our decision will depend upon the construction to be given to this statute. It was passed on June 27, 1902, and is a law giving general authority to the street commissioners of Boston to assess betterments for public improvements completed by the city within six years before its enactment, "consisting of laying out, relocating, altering or widening, with or without construction or

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sewer, a highway, or a highway and parkway, public way or public alley, or of changing the grade of, or constructing with or without a sewer, a highway, or a highway and parkway," etc. At that time assessments of betterments in Boston under different statutes had been held invalid by this court, in some cases on account of the unconstitutionality of the statute, and in others on account of irregular or illegal action of the public authorities in proceedings on which the assessments were founded. *Lorden* v. *Coffey*, 178 Mass. 489. *Warren* v. *Street Commissioners*, 181 Mass. 6; *S. C.* 183 Mass. 119. See *Harwood* v. *Street Commissioners*, 183 Mass. 348; *White* v. *Gove*, 183 Mass. 333. It was supposed that there were other invalid assessments, or other public improvements to pay the cost of which assessments of betterments had been contemplated, which in view of these decisions could not then be legally made. Huntington Avenue had been constructed at an expense to the city of about $675,000, in disregard of the requirements of the statutes as to the mode of doing the work. An assessment of betterments for this construction had been held to be invalid, because of the violation of law that entered into the cost of the work which the abutters were asked to pay. *Warren* v. *Street Commissioners*, *ubi supra*. It seemed that no part of this cost could be assessed upon the estates specially benefited, without additional legislation. Under these circumstances the act in question was passed.

Two questions arise under it: One is whether the Legislature constitutionally could authorize a re-assessment of betterments from the construction of Huntington Avenue, so as to include in the assessment a portion of the expenditures made in violation of the statute; the other is whether the Legislature intended to authorize such a re-assessment. As to the first question, the counsel for one of the petitioners concedes that the Legislature may authorize the re-assessment of a betterment tax if the original assessment failed because of informality or other defect. But we have before us an argument that the statute, if construed according to the contention of the respondents, is unconstitutional.

The assessment of betterments under statutes of this kind is simply a mode of special taxation to meet the expenses of gov-

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ernment in making public improvements which specially benefit particular property. If the other necessary conditions exist, such taxation may be authorized after, as well as before, the expenditure is incurred. *Hall* v. *Street Commissioners*, 177 Mass. 434, and cases there cited. This proposition includes, of course, the authorization of a re-assessment to take the place of one which is void for irregularity or error. *State* v. *Mayor & Common Council of Newark*, 5 Vroom, 236. *Dean* v. *Charlton*, 27 Wis. 522. *In re Piedmont Avenue East*, 59 Minn. 522. *Manley* v. *Emlen*, 46 Kans. 655. *Musselman* v. *Logansport*, 29 Ind. 533. *Chicago* v. *Sherman*, 212 Ill. 498. If the defect that makes the assessment void is an irregularity or error which the Legislature might have authorized, or an omission of that which it might have dispensed with by a proper statute, it is not beyond the power of the Legislature to correct the error by a subsequent act. The illegality in this case, which rendered the former assessment void, was a disregard of the requirements of the statutes that the work should all be done by contract, that the number of contracts should not exceed five, and that when work was to be done by the superintendent of streets the estimated cost of which was $2,000 or more he should invite proposals therefor by advertisements in daily newspapers unless he had authority in writing from the mayor to do otherwise. There was a wide and apparently deliberate departure from these requirements, which relieved abutters from liability to special assessment to meet such expenditures under the St. 1894, c. 416. *Warren* v. *Street Commissioners*, 181 Mass. 6. But the only illegality was the failure to observe the methods which had been prescribed for the protection of taxpayers. It was in the power of the Legislature to authorize the performance of such public work precisely as this was performed. The methods adopted may or may not have caused the city substantial loss. However that may be, notwithstanding the previous disregard of the law, it was in the power of the Legislature to relieve the general taxpayers by assessing a part of this expense upon estates specially benefited. So far as appears, the expenditures were not of such a kind that the indebtedness created by them may not be made the subject of either general or special taxation. We are of opinion that the statute is constitutional.

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It is contended by the petitioners that the Legislature did not intend to make the statute apply to Huntington Avenue. But the language is broad and sweeping, including in its ordinary meaning this public improvement as well as numerous others. The provision is general, referring to all such improvements which had been completed within six years. It contains nothing to suggest that the Legislature had in mind cases in which the work had been done under any particular statute or class of statutes. This work had been done under a special act. But it was a work of great magnitude, and other very expensive public works in Boston had been constructed under special acts. See Sts. 1893, c. 339; 1894, c. 416; 1895, c. 334; 1896, cc. 209, 516. There is nothing to indicate that this statute was intended to apply only to improvements made under general laws. Nor is there any reason to think that it should apply to cases in which the defect arose from the unconstitutionality of a statute, rather than to those in which the original assessment was defeated by some informality or illegality in the proceedings. It is plain that the statute was enacted to enable the city to assess betterments in cases where, on account of unconstitutionality or illegality, or other defect in the statutes or proceedings, a valid assessment could not otherwise be made. The fact that there were defects of different kinds, which made such an enactment desirable, is a sufficient reason for making it in general terms, without reference to any particular kind of defect. This great expenditure and the fact that the general assessment founded on it had been declared invalid were known to the Legislature. It is hardly conceivable that, in framing this statute with its general provisions, they intended that the payment of a part of the cost of Huntington Avenue by special assessment should be left unprovided for.

Under this statute the assessment cannot exceed one half of the cost of the improvements, and thus abutters are relieved from a part of the charge that might have been put upon them under the original act, which authorized a special assessment of the whole cost. This indicates liberality towards those upon whom invalid assessments had been or might be made under former statutes. Another statute, passed about the same time, indicates also the adoption of a more liberal policy towards abutters generally in the city of Boston. St. 1902, c. 521.

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It is contended that the statute in question contemplates the making of assessments for improvements for which valid assessments of betterments have previously been made, and that in its provisions in reference to prior assessments which have not been wholly paid, or have been paid under protest and suits brought within three months after the payment to recover them, which suits are pending, it purports to authorize assessments which are not proportional or equal, and that therefore it is unconstitutional.

If it were true that the statute authorized assessments in cases in which prior valid assessments had been made, there might be force in this suggestion. If such valid previous assessments which had not been wholly paid might be revised and made to conform to the new assessment under the language of this statute, while such valid assessments as had been wholly paid were allowed to stand under the provision that no parcel for which assessment shall have been paid and not recovered back shall be subject to the payment of another assessment for that improvement, unequal and disproportional taxation would be likely to result; for the original assessments being valid, those who had paid without protest would be assessed at one rate which they would have no power to change, while those who had not paid would be entitled to revision, and presumably reduction, to conform to the new assessment at a different rate. But we are of opinion that the statute contemplates the making of but one valid assessment for any improvement, and that its reference to former assessments is to those that are invalid. In that view, this objection does not arise. Everybody who is affected at all by the proceedings under this statute will be entitled to be assessed in the same manner and at the same rate. The only peculiar provision is, that the estates of owners who have voluntarily paid former invalid assessments in full, so that there is no right to recover them back, shall not be subject to another assessment. Such owners cannot complain of the statute, for it does not affect their rights in any way, except as it diminishes for every taxpayer the amount to be paid by general taxation. The owners of other estates which are assessed under it cannot complain, because their estates are all assessed upon the same basis, and they do not suffer from leaving out those estates for which ample payments have already been made. If it appeared probable that

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there were numerous previous invalid assessments which had been fully paid without protest, and which were less in amount than those which are likely to be made under this statute, so that the later assessments would be increased by omitting those estates for which previous invalid assessments had been paid, it might well be contended that the assessments are not proportional and equal, and that the statute is invalid. But presumably the Legislature did not contemplate the existence of such assessments. It does not appear, and we have no reason to suppose, that there are any such. On the other hand, under this statute, not exceeding one half of the expenses incurred for the improvement can be assessed, while under former statutes the whole could be assessed, if it did not exceed the special benefits. The statute must be presumed to have been enacted under an assumption by the Legislature that any previous invalid assessments that had been paid in full without protest, so that the estates would be exempt under this statute, were not less in amount than the sums that otherwise would be assessed upon them under this statute, and that therefore the owners of other estates do not suffer from their exemption. In this view the statute is constitutional in this particular. In each case the entry should be

Petition dismissed.

M. Storey, (*C. Warren & J. Codman* with him,) for Winslow Warren.

M. Donald, for Eben D. Jordan and others.

T. M. Babson, for the respondents.

H. W. Putnam, by leave of court, filed a brief for parties having interests similar to those of the petitioners.

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THEODORE HOAGUE, trustee, *vs.* HARRY W. CUMNER.

Suffolk. November 30, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Bankruptcy. Assignment, For benefit of creditors. *Insolvency.*

Under the bankruptcy act of 1898 an assignment for the benefit of creditors good at common law cannot be set aside by a trustee in bankruptcy if made more than four months before the filing of the petition in bankruptcy.

An assignment for the benefit of creditors good at common law is none the less valid in relation to the bankruptcy act of 1898 because no copy of it has been deposited with the clerk of the city or town in which the principal business of the debtor is carried on as required by R. L. c. 147, §§ 21, 22, for the purposes of proceedings in insolvency, those provisions having no reference to the bankruptcy act or to the rights of creditors at common law and like other parts of our insolvency law being suspended so long as the bankruptcy act continues in force.

BILL IN EQUITY, filed March 16, 1904, by the trustee in bankruptcy of the estate of one Winthrop Messenger of Boston to set aside a conveyance to the defendant purporting to be a common law voluntary assignment for the benefit of creditors.

In the Superior Court *Hardy*, J. made a decree dismissing the bill with costs; and the plaintiff appealed. At the request of the plaintiff the judge appointed a commissioner under Chancery Rule 35 to take the evidence in the case to be reported to this court.

A. Lincoln, for the plaintiff.

G. F. Piper, for the defendant.

KNOWLTON, C. J. The plaintiff is the trustee in bankruptcy of one Messenger, who, more than four months before the commencement of the proceedings in bankruptcy, made an assignment of his property to the defendant for the benefit of his creditors, which was assented to by a majority of them, both in number and value. This bill is brought to set aside the assignment and recover the property. It was said by the plaintiff's counsel, at the hearing, that no question was made in regard to the validity of the assignment, except that a copy of it was not deposited with the clerk of the city or town in which the principal business of the debtor was carried on, as is required by the R. L. c. 147, § 22.

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Construing the assignment, first, as valid at common law and under the statutes of this Commonwealth, (see *Faulkner* v. *Hyman*, 142 Mass. 53,) and postponing for the moment the consideration of the statute just referred to, the length of time that the assignment had been in force prior to the commencement of the proceedings in bankruptcy rendered its validity free from disturbance by these proceedings. We have been referred to no case which decides or intimates that, under the present statute, conveyances valid at common law and under local laws can be set aside on account of proceedings begun after the expiration of four months from the time of their execution. Under the bankruptcy act, U. S. St. 1898, c. 541, conveyances made in fraud of the act within four months prior to the filing of the petition in bankruptcy are void. § 67 *e*. The implication is that, if there is no other element of fraud than a fraudulent preference under the statute, or an act of bankruptcy committed more than four months before the commencement of the proceedings, the trustee acquires no right to interfere with the conveyance. Section 70 *e*, which gives the trustee a right to avoid any transfer that might have been avoided by any creditor, includes all conveyances which are fraudulent against creditors at common law, but it does not include an assignment like the present, which we have assumed to be valid both at common law and under our statutes.

We come now to the plaintiff's second contention, namely, that the conveyance was rendered void by the R. L. c. 147, §§ 21, 22, because no copy of it was filed in the office of the town clerk. The contention is that any creditor who did not assent to it might set aside the assignment by an attachment for his debt, and that therefore the trustee is entitled to the property under § 70 *e*, of the bankruptcy act. This statute has no reference, either to the bankruptcy act, or to the rights of creditors at common law. It is intended for the protection of trustees, acting in good faith under assignments for the benefit of creditors, in cases in which the assignment is set aside because of subsequent proceedings in insolvency. The failure to satisfy the conditions of § 22 does not affect the validity of the assignment. It simply leaves the assignee without the protection given in § 21, when the assignment is set aside on account of subsequent proceedings in insolvency. Like other parts of our

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insolvency law, it is superseded by the bankruptcy act, and remains in abeyance so long as the bankruptcy act continues in force. See *Parmenter Manuf. Co.* v. *Hamilton*, 172 Mass. 178. The assignment is valid, notwithstanding the proceedings in bankruptcy.

Decree affirmed.

WARD M. OTIS, trustee, *vs.* ELLA A. MARCH & another.

Middlesex. December 2, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Devise and Legacy. Power.

A testator left a fund in trust, to pay the income to a son during his life, "and at his death the principal to distribute among those persons who would be legally entitled to receive the same were it given to him absolutely and he owing no debts." The son died testate leaving a wife and adopted daughter, and by his will gave $100 to his adopted daughter and "the balance" of all his property both real and personal to his wife. *Held*, that no power of appointment in the son could be inferred from the above bequest in trust, that the son by his will did not undertake to dispose of the trust fund held under the will of his father which was not his property, and therefore that the will of the son must be disregarded in distributing the fund under the will of the father, the result being that one third of it should be paid to the widow and two thirds to the adopted daughter.

BILL IN EQUITY, filed March 22, 1904, in the Probate Court for the county of Middlesex, by the trustee under the will of Delano March, late of Watertown, for instructions.

In the Probate Court *Lawton*, J. made a decree ordering that the whole of the trust fund be paid and transferred to Ella A. March, widow of Frank D. March, as the residuary legatee under his will. Mildred March, adopted daughter of Frank D. March, appealed, and the case came on to be heard before *Hammond*, J., who reserved it upon the bill and answers for determination by the full court.

W. H. H. Tuttle, guardian *ad litem* for Mildred March.

H. I. Cummings, for Ella A. March.

KNOWLTON, C. J. In response to this bill of a trustee for instructions two respondents appear, Mildred March, the adopted daughter of Frank D. March, and Ella A. March, his widow and

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residuary legatee. The fund in question is held under the will of Delano March, the father of Frank D., in trust, to pay the income to Frank D. March for his life, "and at his death the principal to distribute among those persons who would be legally entitled to receive the same were it given to him absolutely and he owing no debts." The adopted daughter claims two thirds of the fund as a distributee, and the widow claims the whole of it as the residuary legatee mentioned in his will.

There is nothing in the will of Delano March that directly suggests any power of appointment in his son, and it is contended by both claimants that there was no power of appointment under it. A general power of appointment, if exercised, makes the appointed property assets of the estate and liable for the debts of the appointor. *Clapp* v. *Ingraham*, 126 Mass. 200. *O'Donnell* v. *Barbey*, 129 Mass. 453, 455. *Crawford* v. *Langmaid*, 171 Mass. 309. It is strongly contended by the widow that there was no power of appointment and no appointment, and that her husband's will is of importance in the controversy, only as showing to whom the property would have gone if it had been given to him absolutely, he owing no debts. We are of opinion that the counsel on both sides are right in their contention that there was no power of appointment.

It does not follow, however, that the son's will shows who would have been entitled to the property if it had been given to him absolutely. So far as we can judge, his will has no reference to this property. It contains but two sentences, the first giving his adopted daughter $100, and the second giving "the balance" of all his property both real and personal to his wife, and appointing her and one Otis executors.

The trust fund held under his father's will was not his property, and is not included in the disposition made by his will. If it had been given to him absolutely, it is a matter of conjecture how he would have disposed of it. The report finds that he left a considerable estate upon which his will operates. If he had owned absolutely this trust fund of about $50,000, and had disposed of it by will, probably he would have made a will very different from this, which disposes only of the estate that he acquired by his own efforts.

There being no attempt to dispose of this fund by the will of

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Frank D. March, nor any intimation in the will as to how he would have disposed of it if he had owned it absolutely and owed no debts, we are of opinion that his will must be disregarded in making the distribution required by the will of his father. The result is that one third of the fund is to be paid to Ella A. March, his widow, and two thirds to Mildred March, his adopted daughter.

So ordered.

STEPHEN A. BREED & another *vs.* HORACE J. GARDNER & another.

ASA M. DUQUET *vs.* SAME.

Suffolk. December 6, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Mechanic's Lien, Bond to dissolve. *Bond*, To dissolve mechanic's lien. *Master in Chancery*. *Deed*, Registration.

The fact that a conveyance of real estate subject to a mechanic's lien is made to a person for the purpose of his giving a bond under R. L. c. 197, § 28, to dissolve the lien, although it may be important evidence of fraud, does not in itself affect the title of the grantee.

A bond given under R. L. c. 197, § 28, to dissolve a mechanic's lien, bearing the signatures of sureties forged by persons falsely impersonating those whose names are signed, does not comply with the requirement of the statute of a bond with sureties, and has no effect to discharge the lien. The approval of the sureties by a master in chancery gives no validity to such a bond, as the approval is only of the qualifications and fitness of the persons whose names are signed, and it is not a part of the master's duty to pass upon the question whether the signatures are forged.

A forged instrument gains no validity from being recorded in the registry of deeds and a *bona fide* purchaser of land which would be affected by it if it were genuine gets no better title by relying on it as recorded.

TWO PETITIONS, filed October 10, 1901, and July 19, 1901, to enforce mechanics' liens on certain real estate on Magnolia Street in that part of Boston called Dorchester.

In the Superior Court the cases were tried together before *Sheldon*, J. It appeared that in the latter part of February or the early part of March, 1903, the validity of the liens being in dispute and no hearings having been had on the petitions to

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establish them, the owners of the equity of redemption of the real estate in question executed and delivered to one William C. Brackett a quitclaim deed conveying the legal title of the property to Brackett. The title so was conveyed for the purpose of having Brackett give bonds dissolving the alleged liens. This purpose was not stated in the deed, but was explained orally to Brackett. Brackett was not pecuniarily responsible, and frequently was employed by different persons to take title to real estate in order to give mortgages thereon and sign mortgage notes. He paid nothing for the conveyance. He was paid by the persons from whom his grantors purchased the property $5 for signing each of the bonds. Otherwise, he had no interest in the property. Soon after taking title Brackett executed bonds as principal for the purpose of dissolving the liens, the bonds being filled out with a description of the property, his own name as principal obligor and the names of the obligees, but being left blank as to dates and the names of sureties. These instruments signed by Brackett were delivered by him to an agent employed by the persons from whom his grantors had purchased, to be used in discharging the liens.

On May 29, 1903, the bonds were filled out completely, one in favor of the petitioners Breed and Trask, and the other in favor of the petitioner Duquet, and were signed by two men, who represented themselves to be John F. Perry and Thomas F. Connor. Counsel for Breed and Trask and Duquet were notified that application would be made to Major Edward J. Jones, a master in chancery, to approve the sureties on the two bonds. Each of the counsel by writing on the back of the instruments waived notice of the time and place of hearing, each attended the hearing before the master in chancery, and each had an opportunity to see and examine the persons who were offered as sureties. The signing by the persons offered as sureties was done in the presence of the master in chancery, and he signed as witness to their signatures. The bonds were in the usual form, the one in the Breed case being for $2,000 and the one in the Duquet case being for $4,000. The persons presented as sureties were sworn and questioned by the master, who took down in writing what they testified to. The master made a brief record of the cases in his docket or record book. Nothing appeared to excite any suspicion

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that the persons offered as sureties were not the persons who they represented themselves to be, or that their conduct was in any way irregular, or that their statements were untrue. The master, after the examination and hearing, signed the blank on the back of each bond approving the sureties. On the same day the instruments were recorded in the registry of deeds of Suffolk County.

In July, 1903, one Mary A. Bolster foreclosed a mortgage upon the property by a sale under the power in the mortgage, and the title was taken by Wilbert S. Bartlett acting for the mortgagee. On July 29, 1903, Bartlett signed an agreement in writing to sell and convey the property to Samuel E. Blanchard, free from incumbrances, except mortgages amounting to $40,000, taxes for 1903 and a sewer assessment. On July 30, 1903, he executed and delivered to Blanchard a warranty deed of the property purporting to convey it free from incumbrances except as stated in the agreement. This deed was recorded the same day. Blanchard had the record title examined, and the judge found that he purchased for value in good faith, relying upon the record title. Blanchard took possession of the property on August 1, 1903, and ever since has been in possession, collecting the rents.

On May 26, 1904, verdicts were given for the petitioners, in the Breed case in the sum of $1,138.46, and in the Duquet case in the sum of $3,170. Thereafter the counsel for Breed and Duquet made an examination concerning the sureties on the bonds, and in June, 1904, became convinced that the persons who signed as sureties had committed perjury and forgery and were not the persons they had pretended to be. They informed Blanchard and Bolster of what they had learned and at once filed motions asking for an order of sale.

This was the first information or notice which Blanchard had that anything was wrong about the giving of the bonds. On June 29, 1904, he filed by consent in each of the cases an intervening petition setting out his title as a *bona fide* purchaser for value, and praying to be admitted as a party respondent to defend the cases and to be heard in opposition to the motions asking for an order of sale.

The judge found that the persons who signed the bonds as

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sureties forged the names of the persons they falsely impersonated and were guilty of perjury in their statements as to who they were and the property they owned. These persons since have disappeared. It did not appear who, if any one, other than the sureties was guilty of fraud or criminality in the matter.

The petitioners contended that Brackett did not have a sufficient title to make him competent to give bonds to dissolve the liens, but the judge refused so to rule and ruled that Brackett upon the facts above found took the legal title to the property and was competent to give bonds to dissolve the liens.

The respondents contended that inasmuch as the motions for an order of sale were made in proceedings at law, the petitioners could not go behind the recorded deeds and instruments, and also that the approval of the sureties upon the bonds by the proper magistrate after a hearing followed by the recording of the bonds in the registry of deeds operated to discharge the liens, especially as against Blanchard, a *bona fide* purchaser, who took his deed relying upon the record title. The respondents contended that upon all the facts the petitioners were not entitled to an order of sale. The judge ruled that the signatures of the sureties upon the bonds being forgeries the instruments were null and void, and were entirely inoperative in spite of the action of the magistrate.

It was agreed that each of the petitioners was entitled to an order of sale unless the bonds dissolved the liens. The judge ordered that in each case the lien be established for the amount found by the jury, and that an order of sale issue. At the request of the respondents, he reported the cases for determination by this court, it being stipulated that the orders should be affirmed if, upon the facts above set forth, the petitioners were found entitled to the orders of sale prayed for; otherwise, the orders were to be reversed, and the cases were to stand for such further action in the Superior Court as law and justice should require.

H. R. Bailey, for the respondents.

N. F. Hesseltine, for the petitioners Breed and Trask.

A. H. Russell, for the petitioner Duquet.

KNOWLTON, C. J. We shall assume, in favor of the respondents, the correctness of the ruling that Brackett had a sufficient

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title to bring him within the R. L. c. 197, § 28, authorizing a person having an interest in property upon which a mechanic's lien is claimed, to give a bond to dissolve the lien upon his interest. He held a conveyance of the equity of redemption, which purported to give him the estate, subject to mortgages. The mere fact that the conveyance was made to him with a view to his giving a bond to dissolve the lien does not affect his title. The owners were in the exercise of their legal right in making the conveyance, and he took the title with the incidents which legally pertained to it. *Curtis* v. *Galvin*, 1 Allen, 215. *Hayes* v. *Fessenden*, 106 Mass. 228. *Glendon Co.* v. *Townsend*, 120 Mass. 346. *Landers* v. *Adams*, 165 Mass. 415. Of course, upon a question whether the bond was given and the approval of it obtained and the record of it made fraudulently, such a conveyance might be very important evidence.

The signatures of the two sureties on the bond were forgeries, and the question is whether the instrument has any legal effect. As against the sureties, it is void. It is, in law, like a bond without sureties. Such a bond does not comply with the requirement of the statute which calls for sureties, and has no effect to discharge the lien. It is even more plainly ineffectual to accomplish its intended object than the bonds which were held void because not signed by the principal, in *Bean* v. *Parker*, 17 Mass. 591, 604, and *Wood* v. *Washburn*, 2 Pick. 24.

The respondents contend that the signing by the sureties in the presence of the master in chancery, and their false answers in regard to their property, constituted an adoption by them of the names which they appended to the instrument, and that this false impersonation made the bond legal and binding upon them as sureties. This is a mistaken view of the contract. Whatever civil remedy might be had against them by a party injured, the bond was given and recorded and accepted as the bond of the persons whose names appeared upon it as principal and sureties. It was an instrument under seal, and the contract embodied in it was a contract in writing, which showed the parties to the instrument, as well as its other provisions. The contract did not grow out of the presence of the two sureties and their oral representations, but out of the instrument itself, which purported to bind the persons whose names appeared upon it as obligors.

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The signing as a false impersonation was not unlike ordinary forgeries. Their further impersonation of the supposed sureties in the examination as to their property did not make the contract with them, as persons present under assumed names; but it left the instrument to tell the story of the contract, and they pretended that it told the truth. The case differs materially from the cases cited by the respondents. See *Edmunds* v. *Merchants' Despatch Transportation Co.* 135 Mass. 283; *Bassett* v. *Daniels*, 136 Mass. 547; *Robertson* v. *Coleman*, 141 Mass. 231. See also *Bartlett* v. *Tucker*, 104 Mass. 336; *Grafton National Bank* v. *Wing*, 172 Mass. 513. The instrument was not within the terms of the statute.

The respondents contend that the approval of the sureties by the master in chancery, under the statute, made the bond good; but his approval was only of the qualifications and fitness of the persons whose names appeared upon the instrument as sureties. It was no part of his duty to pass upon the question whether the signatures were forged or genuine. He was to inquire into the financial ability and the suitableness of the persons represented by the names appended to the instrument. His signature gave no validity to the forged bond.

It is not contended by the respondents that a title taken by a *bona fide* purchaser, in reliance upon a forged instrument recorded in the registry of deeds, is good if a valid instrument of that kind is needed to transfer the title from a former holder. In the present case Blanchard stands no better than did Bolster, from whom he took his deed. In each case the entry is to be,

Order affirmed.

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WILLIAM F. KEYES *vs.* WILLIAM C. BRACKETT & others.

Suffolk. December 6, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Equity Jurisdiction, To cancel bond void for fraud. *Bond*, To dissolve mechanic's lien. *Master in Chancery*.

This court has jurisdiction in equity to order the cancellation of a bond, fraudulently given to dissolve a mechanic's lien, the approval of which by a master in chancery under R. L. c. 197, § 28, has been procured by fraud and perjury.

BILL IN EQUITY, filed January 8, 1904, by one holding a mechanic's lien on certain real estate on Magnolia Street in that part of Boston called Dorchester, praying that a certain bond alleged to have been given fraudulently for the purpose of dissolving the plaintiff's lien be expunged of record in the registry of deeds and for other relief.

In the Superior Court the defendants demurred, and the bill was amended by leave of court. Thereafter the case was heard by *Sheldon*, J. upon the demurrer as applying to the bill as amended. The judge overruled the demurrer, and the defendants appealed from the interlocutory decree. The judge, being of opinion that the questions raised by the appeal so affected the merits of the controversy that the matter before further proceedings ought to be determined by this court, at the request of all the parties reported the questions for that purpose, and in the meantime stayed all further proceedings except such as were necessary to preserve the rights of the parties. If the demurrer was overruled rightly the defendants were to answer; otherwise, the bill was to be dismissed.

H. R. Bailey, for the defendants.

J. P. Crosby, for the plaintiff.

KNOWLTON, C. J. This case comes before us on the defendants' demurrer. The bill states that the plaintiff has a claim on which is now due the sum of $4,080 for labor and materials, performed and furnished in the erection of a building on land owned by the defendant McDaniel, that the former owners

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of the estate, with whom McDaniel made his contract, were adjudged bankrupts and are financially worthless, and that a petition is now pending in the Superior Court to enforce his lien. According to the averments of the bill, the defendant McDaniel conveyed the property to the defendant Brackett simply for the purpose of having him sign a bond to dissolve the plaintiff's lien as principal, Brackett being of no financial ability, and Brackett now holds the property for the benefit of McDaniel. All the defendants, McDaniel, Brackett, Lo Cascio and Harmon, then fraudulently conspired together to procure the approval by a master in chancery of a worthless bond to dissolve the plaintiff's lien. Brackett, the holder of the legal title to the property, as principal, and Lo Cascio and Harmon as sureties, signed a bond in the sum of $6,000, running to the plaintiff, for the dissolution of the lien. In pursuance of this conspiracy, each of the defendants Lo Cascio and Harmon, at a hearing before a master in chancery upon an application for the approval of the bond, with the knowledge of the defendants Brackett and McDaniel, falsely, wilfully, knowingly and corruptly, testified under oath that he owned certain property specifically described by him, of a value greatly in excess of $6,000, whereas in truth neither of them had or now has any property or money, or is of any financial ability, but each of them is absolutely worthless and wholly unable to perform the condition of the bond. In this way they procured the approval of the bond which was afterwards recorded in the registry of deeds. See R. L. c. 197, § 28.

If these averments are true, a gross fraud was perpetrated upon the plaintiff and the magistrate. It is plain that the plaintiff has no complete and adequate remedy at law, and the question is whether he can have relief in equity.

The chief argument against granting relief is that the fraud was perpetrated in connection with a hearing before a magistrate who was acting judicially, and that it entered into his finding, which is conclusive upon the parties. We appreciate the importance of the rule that a judgment of a court cannot be set aside by another tribunal merely because of false testimony, fraudulently introduced, which was considered and perhaps believed at the trial. Ordinarily a fraud which will warrant a court in setting aside a judgment must be extrinsic to a trial rather than in

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the matters presented for consideration as a part of the trial itself. *Greene* v. *Greene*, 2 Gray, 361. *Edson* v. *Edson*, 108 Mass. 590. *United States* v. *Throckmorton*, 98 U. S. 61. *Vance* v. *Burbank*, 101 Mass. 514. *Steel* v. *Smelting Co.* 106 U. S. 447. *Gray* v. *Barton*, 62 Mich. 186, 196. *Folsom* v. *Folsom*, 55 N. H. 78. *Hass* v. *Billings*, 42 Minn. 63, 67. *Pico* v. *Cohn*, 91 Cal. 129. The reason for this rule in trials of cases upon formal pleadings, where usually there is either a right of appeal or an opportunity for other revisory proceedings before the case is finished, does not apply with so much force to a hearing before a magistrate upon an application to approve a bond. Such a hearing is not had upon pleadings in which issues are stated, that give an opportunity for preparation. It is commonly had upon short notice, and usually the testimony cannot be anticipated, nor is there an opportunity to meet it. If a certificate of approval is made, the jurisdiction of the magistrate is ended, there is no opportunity to appeal, and neither the magistrate himself nor any other magistrate or court has any power to review the proceedings and correct errors. The opportunity for fraud is open, and there is no effectual way of meeting and overcoming it. In view of these conditions, we are of opinion that the present case should not be treated exactly like a case of similar fraud committed in an ordinary trial in a court.

The bill states a case of fraud which is something more than an intentional introduction of false testimony in an ordinary trial. In the first place, the owner, McDaniel, exercised his legal right to convey the property to an irresponsible person, with a view of making him the principal on a bond that should be worthless. This was a matter with which the master in chancery had nothing to do, and of which, presumably, he had no knowledge. No harm would have come from it if proper sureties had been furnished, or if they had testified truly. With this plan, which fraudulently represented Brackett to be the true owner, and which deprived the bond of strength that it should have had, he coupled the conspiracy to deceive the plaintiff and the magistrate by the perjury of the sureties. The result is, an instrument which in every part is false and fraudulent, in reference to the objects for which such instruments are supposed to be made. In view of the consequences that naturally come from such a fraud,

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and of the fact that there is no way of avoiding these consequences, so long as the instrument is permitted to stand, and of the further fact that no rights of innocent parties have intervened, we are of opinion that the plaintiff should have relief in equity. *Currier* v. *Esty*, 110 Mass. 536. *Billings* v. *Mann*, 156 Mass. 203. *Weeks* v. *Currier*, 172 Mass. 53. *Brooks* v. *Twitchell*, 182 Mass. 443, 444. *McAveney* v. *Brush*, 1 App. Div. (N. Y.) 97. *Hibbard* v. *Eastman*, 47 N. H. 507. *Craft* v. *Thompson*, 51 N. H. 536, 542.

If substantial grounds for granting relief are established there is no doubt of the power of the court to devise an effectual method of giving to the plaintiff his rights. The bond may be ordered cancelled, and the defendants McDaniel and Brackett and those holding under them enjoined from claiming any rights founded on the bond, and they may be ordered to execute a release of all rights acquired under the bond, and a discharge of the benefits which the statute would give them as owners of the real estate by reason of the execution, approval and recording of the bond, which may be recorded in the registry of deeds. Similar relief has been granted in many cases. *Willcox* v. *Foster*, 132 Mass. 320. *Bruce* v. *Bonney*, 12 Gray, 107. *Short* v. *Currier*, 150 Mass. 372. *Crosse* v. *Bedingfield*, 12 Sim. 35. *Hamilton* v. *Cummings*, 1 Johns. Ch. 517.

We are of opinion that the demurrer was rightly overruled, and that the defendants should answer over.

So ordered.

EDMUND D. CODMAN & another *vs.* HERBERT F. BRIGHAM & others.

Suffolk. December 7, 8, 1904. — January 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Executor. Trust. Charity. Perpetuity.

Where a will transfers the whole residue of the testator's property to the executors charged with a trust in regard to the management and disposition of it the executors necessarily take as trustees although the word "trustee" is not used.

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A gift by will of a fund to trustees for the establishment of a hospital for sick persons in indigent circumstances, to be held and accumulated for twenty-five years before it is put to active use, is not invalid although the time for accumulation extends beyond the limit prescribed by the rule against perpetuities. In such a case a charity is created at once, the equitable estate in that part of the public which is to be benefited as well as the legal estate in the trustees vesting immediately when the will is proved.

In a gift by will of a fund to trustees for the establishment of a hospital for sick persons in indigent circumstances, to be held and accumulated for twenty-five years and then to be transferred to a corporation to be formed for carrying out the purposes of the trust, the formation of the corporation and the transfer of the property to it are mere details of administration prescribed by the testator not affecting the general character of the charitable gift, and if for any reason the establishment of such a corporation is impossible the gift does not fail, but the court will devise some method of administering the charity *cy pres* to accomplish substantially the same result.

BILL IN EQUITY, filed March 31, 1903, by the trustees under the will of Peter Bent Brigham, late of Boston, and by the same persons as administrators *de bonis non* with the will annexed of the estate of the testator, for instructions.

The case was heard by *Lathrop*, J., who reserved it for determination by the full court upon the pleadings and orders in the case, with a report of the facts as found by him.

J. L. Thorndike, for the trustees.

C. A. Snow, for the heirs at law.

L. S. Dabney, for the Peter Bent Brigham Hospital.

KNOWLTON, C. J. This is a bill brought by the trustees appointed under the will of Peter B. Brigham, for instructions in regard to the disposition of certain income in their hands, received under the fourteenth clause of the will. This clause is as follows: "All the rest and residue of my property and estate, of every kind and description, real personal and mixed, of which I shall die seised or possessed, or to which I shall be entitled at the time of my decease, I direct my said executors to take, hold, manage and invest, for the term of twenty-five years from the time of my decease, and to take the rents, interest, income and profits thereof and from the net income thereof to appropriate and pay as follows, that is to say:" Then follow seven provisions for the payment of annuities to relatives and friends of the testator, with directions on the death of the annuitants to pay specific sums to their children if they die leaving children, concluding as follows: "My said executors shall add the balance

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of said net income, that shall remain after making the payments aforesaid, to the principal of my said estate, so that the same may be accumulating for the term of twenty-five years aforesaid; and at the expiration of said term of twenty-five years from my decease, my said executors shall set aside a sum or sums of money and may deposit the same in some safe trust company, — preference being given, other things being equal, to the Massachusetts Hospital Life Insurance Company, of said Boston, — which shall be sufficient to provide for the payment of such of the foregoing legacies and bequests, if any, as shall then be unfulfilled; or may provide for the payment of such unpaid legacies and bequests by the purchase of annuities for the unpaid legatees or otherwise, as my said executors shall deem expedient; and after the payment, or provision for the payment, as aforesaid of all the foregoing bequests and legacies, the unexpended balances, if any, shall be paid to and for the use of the hospital hereinafter provided for."

Then comes the following paragraph: "8. At the expiration of said term of twenty-five years from the time of my decease, my said executors shall dispose of said rest and residue of my property and estate and of all the interest and accumulations which shall have accrued thereon, for the purpose of founding a hospital in said Boston, to be called the Brigham Hospital, for the care of sick persons, in indigent circumstances, residing in the said County of Suffolk, in the following manner, — that is to say: They shall procure the formation of a corporation, to be called the 'Brigham Hospital' with suitable provisions as to officers, their powers and duties for control, direction, conduct and administration of the corporation and the care and management of the funds in its charge; and upon the legal formation and organization of said corporation, my said executors shall transfer to it all the property and estate provided for it as aforesaid, to be by it used and employed for the purposes above declared: — and I give, devise and bequeath said rest and residue of my property and estate accordingly."

The testator died on May 24, 1877, leaving real estate valued at $690,000, and personal estate which amounted to about $325,000, after payment of debts and the legacies other than those payable under the fourteenth clause. The executors quali-

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fied, and managed the property until the death of the last survivor of them, when the plaintiffs were appointed trustees by the Probate Court, and, thus succeeding to the rights of their predecessors, they since have continued the execution of their trust. The corporation was formed under the general laws in May, 1902, and because such a corporation could not hold property in excess of $1,500,000, the St. 1902, c. 418, was passed on May 22 of that year, which authorized the corporation to hold real and personal estate to an amount not exceeding $5,000,000. On May 24, 1902, $1,311,935.65 was paid to the corporation by the trustees. The whole property in the hands of the corporation, with that held by the trustees to meet the remaining payments called for under the seven provisions of the fourteenth clause, amounts now to more than $5,000,000.

It earnestly is contended by the heirs at law of the testator, that the gift for the purpose of founding a hospital is void under the rule against perpetuities. It therefore becomes necessary to ascertain the meaning and construction of the will. This clause begins with instructions to the executors in regard to the possession, management and disposition of the residue of the estate, and, after proceeding at length with these directions, it ends with the words, "and I give, devise and bequeath said rest and residue of my property and estate accordingly." These directions involve a final disposition of the whole of the residue, and the closing words expressly devise and bequeath it. The whole language, considered together, transfers the title of all the property to the executors, charged with a trust in regard to the management and disposition of it. This involves the performance of duties beyond those which belong to executors, and they necessarily take as trustees, although the word "trustee" is not used. *Carson* v. *Carson*, 6 Allen, 397. *Bean* v. *Commonwealth*, 186 Mass. 348. *Fay* v. *Taft*, 12 Cush. 448. *Sears* v. *Russell*, 8 Gray, 86, 89. *Mullanny* v. *Nangle*, 212 Ill. 247. The trust is for charitable uses, and the instrument creates, from the death of the testator, a public charity. The beneficiaries who are entitled to the equitable interest are sick persons in indigent circumstances, residing in the county of Suffolk, for whose care a hospital is to be established. *Burbank* v. *Burbank*, 152 Mass. 254. This charitable trust comes into ex-

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istence immediately on the probate of the will, and it comprises all the rest and residue of the estate, except so much as is needed to make the payments called for in the seven provisions above referred to. Not only the legal but the equitable estate vests immediately, the legal estate in the trustees, and the equitable in that part of the public which is to be benefited. So much as is required to pay the annuities and the sums which are to go to the surviving children of annuitants is held under a private trust, and this amount, whatever it may prove to be, diminishes to that extent the amount which otherwise would be appropriated to charitable uses.

It is provided that the fund shall be held and accumulated for twenty-five years before it shall be put to active use for the relief of the suffering. Such a provision is not uncommon, and even though the time for the accumulation may extend beyond the time prescribed in the rule against perpetuities, it is not invalid. *Odell* v. *Odell*, 10 Allen, 1. *St. Paul's Church* v. *Attorney General*, 164 Mass. 188, 203. *Ould* v. *Washington Hospital for Foundlings*, 95 U. S. 303. *Russell* v. *Allen*, 107 U. S. 163.

These and the other provisions, in regard to the management of the property, the payments from the income of the sums due the annuitants, the establishment of a corporation, and the transfer of the property to the corporation, are all mere details of administration which the testator saw fit to prescribe, and which do not affect the general character of the charitable gift, or the nature of the title created by the clause in question. Nothing passes directly to the corporation under the will. It takes through a conveyance from the trustees, made in the execution of their trust. *Ould* v. *Washington Hospital for Foundlings*, 95 U. S. 303, 312. *Jones* v. *Habersham*, 107 U. S. 174. *Crerar* v. *Williams*, 145 Ill. 625, 648. The corporation is simply a part of the machinery to be provided by the trustees, the better to execute the charitable purpose of the testator. If for any reason it should be impossible to establish such a corporation, the gift would not fail, but the court would apply the doctrine of *cy pres*, and provide some other method of administering the charity to accomplish substantially the same result. *Darcy* v. *Kelley*, 153 Mass. 433, 437. *Weeks* v. *Hobson*, 150 Mass. 377. *Amory* v. *Attorney General*, 179 Mass. 89, and cases above cited.

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When the corporation is established with power to hold the property, the trustees make a conveyance which transfers the legal title to the new party, which takes and holds it under the same charitable trust. The substance of the charity is a gift of property to be held and used for the care of sick persons in indigent circumstances in a hospital. That the hospital is to be established and maintained by a corporation, rather than by personal trustees, is not of the essence of the gift. *Sears* v. *Chapman*, 158 Mass. 400. All of these details as to management are to be regarded and put in execution so far as practicable. But such a gift is not allowed to fail if it becomes impossible to use it in exactly the mode prescribed.

The contention that the gift is directly to the corporation, limited upon preceding bequests to individuals, and that it may not take effect until more than twenty-one years after the expiration of a life or lives in being, is therefore not well founded, and the same is true of the argument that the gift to the charity is contingent.

The income and accumulations of the property go with the corpus of the fund, so far as the title is concerned. *Tainter* v. *Clark*, 5 Allen, 66, 69. *Wharton* v. *Masterman*, [1895] A. C. 186, 192, 198. The legal title to the property having vested in the trustees, the title to its earnings was in them also. The right to have the earnings, when they should accrue, vested at once in the charity on the death of the testator. Any other doctrine would render provisions for accumulation ineffectual. See *Odell* v. *Odell*, 10 Allen, 1, and cases there cited. The expressions in the opinions in *Hale* v. *Hobson*, 167 Mass. 397, and *Cronan* v. *Adams*, 185 Mass. 436, relied on by the heirs at law, do not mean that the owner of a principal fund, on which income subsequently accrues, has not a vested right to the income from the beginning. They simply mean that the income, as income, is not vested in possession until it comes into existence. See also *Safe Deposit & Trust Co.* v. *Wood*, 201 Penn. St. 420, 427; *Rhode Island Hospital Trust Co.* v. *Noyes*, 26 R. I. 323. The income in this case, subject to the payments to be made from it under the seven provisions, was all the time held for charitable uses, as the principal was.

The view which we have taken of the meaning of the clause

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in question makes it unnecessary to consider many of the questions elaborately argued by the counsel for the heirs. These questions grow out of an entirely different construction of the language of the will.

The decision of the Circuit Court of the United States in another suit brought by one of the heirs, and raising the same questions which are before us, is in accordance with the view which we have taken. *Brigham* v. *Peter Bent Brigham Hospital*, 126 Fed. Rep. 796. This decision was affirmed by the Circuit Court of Appeals, in an opinion (December 7, 1904), which appears in 134 Fed. Rep. 513.

The plaintiffs are instructed to pay to the Peter Bent Brigham Hospital the income and interest which they held at the time of bringing the suit.

So ordered.

SARAH P. LIVINGSTONE *vs.* JAMES H. MURPHY & others.

Berkshire. September 20, 1904. — January 10, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Husband and Wife. Equity Jurisdiction, To reform instrument on account of mistake of fact. *Laches. Frauds, Statute of. Trust*, Resulting. *Mortgage*, Of real estate. *Estoppel. Deed.*

A deed from a deputy sheriff to a wife made in pursuance of a sale on an execution against her husband is void.

A mistake as to the ownership of land is a mistake of fact in regard to which equity will grant relief, although the mistake arose from an erroneous view of the legal effect of a deed.

If the defence of the statute of frauds is not pleaded and is not relied upon at the trial it is waived.

In a suit in equity to reform an instrument in writing which owing to a mistake of fact fails to express the alleged intention of the parties, the plaintiff is not chargeable with laches on account of a lapse of time after the execution of the instrument if he files his bill within a reasonable time after becoming aware of the mistake.

Where a husband and wife to secure their joint note agree to give a mortgage covering the entire interest of both of them in a certain lot of land, but by a mistake of fact the land is believed by all the parties to belong to the wife, whereas it belongs to the husband, and a mortgage accordingly is executed by the wife

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the husband joining only to release his right of curtesy, the mortgage incorrectly describing the note as that of the wife alone, the mortgagee can maintain a bill in equity against the husband and wife to compel them to execute a new mortgage conveying the entire title of each of them, and such new mortgage will be good against all parties who took after the imperfect mortgage was given with notice of its infirmity. In such a case the record of the mortgage given by the wife with the release of curtesy by the husband gives no notice of the agreement of the husband which is an essential part of the equitable claim of the mortgagee.

No notice is given of a resulting trust by a recital in a deed by a deputy sheriff to a wife in pursuance of a sale on an execution against her husband, that the consideration named in the deed was paid by the wife, as such a deed passes no legal title to which the equitable right can attach.

The exception from the covenants of a mortgage of a prior mortgage does not estop the mortgagee from contesting the validity of the prior mortgage as against the holder of it.

Under R. L. c. 127, § 2, a quitclaim deed in the ordinary form to a purchaser for a valuable consideration without notice conveys a title free from equities, and the burden of proving notice is on one alleging it.

HAMMOND, J. This is a bill to reform a mortgage deed. While its allegations, especially with reference to the existence and nature of the agreement under which the mortgage was given, are somewhat defective and might perhaps be held insufficient as against a special demurrer, still, in the absence of such a demurrer, the bill may be construed as setting out in substance that there was an agreement between the plaintiff on the one hand, and the mortgagor, Margaret J. Murphy, and her husband, James H. Murphy, on the other, that the mortgage should cover the entire interest both of the husband and wife in all of the land therein described; that by reason of a mutual mistake as to the ownership of the northerly part of the land, the title to which part was in the husband and not in the wife, the mortgage does not in fact cover that part and therefore it is not in accordance with the agreement. The prayer of the bill is in substance that the mortgage be reformed and that to that end James H. Murphy be ordered to execute and deliver to the plaintiff a mortgage conveying his right in all the land, to take effect as of the time of the date of the plaintiff's mortgage.

The bill with its amendments sets out the names of various parties who, since the mortgage to the plaintiff, have, either as attaching creditors, mortgagees or grantees, become interested in the land, and they are all made defendants. At the trial, how-

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ever, the only defendants represented were the two Murphys and Wood, who was the holder of a prior mortgage discharged when a mortgage to the plaintiff was made, and also holder of a mortgage subsequent to that of the plaintiff. The bill has since been taken for confessed against all the others.

The defendant James H. Murphy urges that, even if there was a contract, he was not a party to it. It appears however that, although the mortgage describes the mortgage note as "signed by the said Margaret J. Murphy," it was in fact signed by her and her husband jointly, and hence his liability on the debt was the same as that of his wife. It further appears that it was the understanding of all parties that the mortgage should cover his interest in the whole land and that in pursuance thereof he signed it to release his right of curtesy which was supposed at that time to be all the interest he had. The judge further finds that he then was ready and willing and by implication agreed to do whatever might be necessary to give a valid first mortgage upon the whole land. Under these circumstances he must be regarded as a party to the contract, so far at least as concerns his interest in the land.

The mistake was as to the title to the northerly lot. All supposed that the wife owned it, whereas it was in fact owned by the husband. She had received in 1893 a deed of it from a deputy sheriff made in pursuance of an execution sale against her husband. This deed was supposed by all parties to be valid and to work a change in the title from James to Margaret, but it was in fact of no legal effect whatever. *Stetson* v. *O'Sullivan*, 8 Allen, 321. The mistake was mutual, and it was one of fact, namely, as to the ownership of the northerly lot. "Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." Lord Westbury, in *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 170. And this is so, although the mistake arises from an erroneous view of the legal effect of a deed in the chain of title. Against such a mistake equity will relieve. *Cooper* v. *Phibbs*, *ubi supra*. *Baker* v. *Massey*, 50 Iowa, 399. *Griffith* v. *Townley*, 69 Mo. 13. Pom. Eq.

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Jur. § 849, and cases cited. See also *Canedy* v. *Marcy*, 13 Gray, 373, 377.

The defendant Wood contends that the agreement was within the statute of frauds. But the statute was not pleaded, nor does it appear to have been relied upon at the trial. Under the familiar rule, that ground of defence must therefore be regarded as having been waived. Nor do we think that the plaintiff is chargeable with laches. She seems to have moved within a reasonable time after she became aware of the mistake. *Canedy* v. *Marcy*, *ubi supra*.

The judge of the Superior Court therefore rightly ruled upon the facts found that as against the mortgagor and her husband "the plaintiff immediately upon the execution of the mortgage to her had an equity to compel them to execute a new mortgage which should be a first lien upon the northerly and southerly lots." And this equity would prevail against all parties who subsequently took with notice.

The main question is whether there was enough upon the record to give to attaching creditors and purchasers notice of this equitable right of the plaintiff, or at least to put them on their inquiry. It will be observed that this was a right to have the defendant James H. Murphy convey to her the title which at the time of her mortgage he had in the northerly lot. To sustain this right it is not enough to show the mutual mistake as to ownership of the lot. It must further appear that there was an agreement on the part of James to convey his interest in it. Strictly speaking, the bill requests not a reformation of the terms of the mortgage actually given, but that a new person shall be made a grantor. It seeks to compel James to execute a new mortgage, and it cannot be maintained against him unless he originally agreed in substance to convey his interest. In a word, the two essential facts upon which the equitable right of the plaintiff rests are first, the mutual mistake, and second, the agreement of James to convey all his interest in the land.

With this view of the plaintiff's case we proceed to examine the records. Margaret's title to the northerly lot rests upon the deed of deputy sheriff Wood, (not the defendant Wood,) to her, dated November 7, 1893. The deed recites that the consideration, $745, was paid by her, and it purports to convey to

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her the interest of her husband James in the northerly lot. The next conveyance is the mortgage given by Margaret to the defendant Wood on February 22, 1894. She is the sole grantor named at the beginning of the mortgage, but after the condition the husband substantially joins therein; and there is a statement at the end of the description that the land is the same conveyed to Margaret by the above mentioned deed of the deputy sheriff. Of this mortgage and its recitals the defendant Wood of course had actual notice, because he was the mortgagee, but inasmuch as it had been discharged and no one claims under it the record is not constructive notice to the other defendants of the recitals therein contained. Next comes the plaintiff's mortgage. Margaret is the sole grantor, while James just before the *in testimonium* clause releases all right of curtesy. Although, as above stated, the mortgage note was actually signed both by Margaret and James, still that fact does not appear in the mortgage. On the contrary the note is therein described as signed by "the said Margaret J. Murphy." Up to this time the record only shows at the most that Margaret received from the deputy sheriff a deed of the lot in question, for which she seems to have paid a valuable consideration; that from that time to the time of the plaintiff's mortgage both Margaret and James acted as if the title to that lot was in Margaret, and that the plaintiff, in taking her mortgage, seems to have acted upon the same view. But that is not enough to put attaching creditors and subsequent purchasers upon their inquiry. This is not the case where the record by fair implication refers to an unrecorded deed, as in cases like *George* v. *Kent*, 7 Allen, 16, nor where one of the parties is declared to be acting in a representative capacity, as in cases like *Hayward* v. *Cain*, 110 Mass. 273. The plaintiff's mortgage proceeded upon the theory that Margaret owned the lot in her own right. So far as shown by the record, the loan was made to and the note was signed by Margaret alone. The most natural inference would be that the only parties to the contract for the loan were Margaret and the plaintiff, and that the plaintiff was content to rely upon Margaret's title for security; that, neither as a party to the contract nor as the owner of the fee, was James concerned in the transaction, and that the only thing he was expected to do was to release curtesy. There is nothing

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on record to show that he acted even as the agent of Margaret, or that he was in any way concerned in the transaction except to do what he did, namely, release his curtesy. It is going too far to say that the simple fact that a husband releases his curtesy in the land described in a mortgage by his wife purporting to convey the land as hers is notice that he has agreed to convey his own interest in the fee if it should turn out that he and not she is the owner. No notice, therefore, of the essential facts was given by the record, nor was there enough to put a person on inquiry.

It is urged by the plaintiff that the recital in the deed from the deputy sheriff to Margaret that the consideration was paid by her gives notice of a resulting trust within the doctrine recognized in *Hayward* v. *Cain*, *ubi supra*. But that doctrine is applicable only where the legal title is conveyed by the deed. The equitable title is attached to such legal title, and where the deed is void of course the doctrine is not applicable. Margaret simply paid a claim of one of her husband's creditors, but that did not give her a resulting trust in the land.

Nor is there anything in either of the two subsequent mortgages to the defendant Wood to show that the plaintiff's mortgage was not exactly what she was entitled to have under her contract. While it is true that the plaintiff's mortgage is excepted from the covenants contained in each of these two mortgages, still there is no agreement on the part of Wood to assume it, and there is nothing to estop him from contesting its validity as against the holder of it. *Weed Sewing Machine Co.* v. *Emerson*, 115 Mass. 554.

We do not understand that the plaintiff now contends that the instrument of release executed by the defendant Wood of the date of June 16, 1898, had any other legal effect than simply to discharge the mortgage given to him as above stated on February 22, 1894.

It follows from what has been said that the plaintiff's equity cannot prevail except as against persons who took their title with notice other than that contained in the record. Applying this principle to the facts, it is clear that it cannot prevail as against the two mortgages held by Wood. Nor can it prevail over the execution sale to the Third National Bank, since it is

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not proved that either the attaching creditor, White, or the bank had notice. Although Wood had notice when he purchased from the bank, still he took the title the bank had. As to all the other defendants who have not seen fit to contest except Renfrew, we think that the plaintiff's equity should prevail. So far as respects the deed to Renfrew, we have had some difficulty as to the true effect of the report. The deed seems to have been given after "it was whispered in Pittsfield that there was a flaw in the plaintiff's title." No copy of it is before us. It was given by James H. Murphy, but it does not appear whether there was any release of dower by his wife. It was a quitclaim deed. No finding is made as to whether Renfrew had notice of the plaintiff's equitable right.

A deed under seal, however, imports a consideration, and a quitclaim deed in the ordinary form would have been sufficient to convey the title to Renfrew free from the equitable right of the plaintiff if he was a purchaser for valuable consideration without notice, (R. L. c. 127, § 2,) and the burden of proving notice is upon the plaintiff. Although the defendant Wood had notice when he bought from Renfrew, still, as in the case of his purchase from the bank, he would take the title his grantor had. The bill was not taken *pro confesso* against Renfrew until long after the deed from him to Wood, and in any event Wood's rights are not affected by this order.

After the original hearing, and after the judge had filed a memorandum of his findings, the plaintiff moved to amend the bill by adding the following: "In the event of the court finding that the plaintiff is not entitled to have her said mortgage reformed as against the owners of the said Wood mortgages and of the title under the said execution sale, the plaintiff offers to pay such amount as is found due for redemption. And the plaintiff prays that in such case the court will determine the amount due for redemption from said mortgages and said execution sale and that the plaintiff be allowed to redeem by paying such amount." The proposed amendment was opposed by Wood and was disallowed by the judge upon the ground that under the facts found by the court the "plaintiff has no right of redemption which extends or applies to the northerly lot." The judge then ordered that the bill be dismissed, and by consent of par-

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ties reported the case for determination by this court upon certain reservations, the first of which was that "if upon the . . . facts" reported by the judge "the order dismissing the bill was right, and if upon those facts the plaintiff is not entitled to redeem, the order is to be affirmed, and a decree prepared and entered dismissing the bill."

In view of the state of the record with reference to the Renfrew deed, we think that the order dismissing the bill was right, because all the title of James H. Murphy in the property seems to have passed to Renfrew free from the plaintiff's equitable right, and hence a conveyance from James to the plaintiff would be of no avail. And for the same reason she is not entitled to a decree allowing her to redeem.

But it may be remarked that there was no need of the proposed amendment. All the parties were before the court, and their rights, both as to priority of title and of redemption, could have been settled by the decree upon the bill as it now stands. The fact that more than a year has expired since the execution sale is of no consequence since the bill was brought within the year.

The result is that upon the report as it stands the bill should be dismissed. But inasmuch as there is quite a large interest in the property to which but for the deed to Renfrew the equitable right of the plaintiff would attach, and there has been no actual finding as to whether he did have notice in fact or was a purchaser for value, we are disposed, in view of the manifest equity of the plaintiff's case, to allow the plaintiff to make an application to the trial court to have the case reopened and the report amended so as to contain a finding upon those points. Unless such an application be made and allowed within sixty days the bill is to be dismissed. If the report be so amended then there is to be a further hearing, if necessary, upon the report as amended, such hearing to be only upon the question of the effect of the deed to Renfrew upon the rights of the plaintiff.

So ordered.

H. L. Dawes, Jr. & C. E. Burke, for the plaintiff.

P. J. Moore, for the defendants Murphy.

W. Turtle, for the defendant Wood.

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EDWIN T. SMITH *vs.* MAYOR OF HAVERHILL & others.

Essex. December 8, 1904. — January 11, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Haverhill, Police department. *Statute*, Repeal. *Municipal Corporations*. *Civil Service Law*.

So much of the charter of Haverhill, St. 1869, c. 61, as related to the police force, particularly § 12 of that chapter amended by St. 1887, c. 357, was repealed by implication by St. 1894, c. 480, which covered the whole subject of the police department of that city.

The provision of St. 1904, c. 314, § 1, that "every person holding office or employment in the public service of the Commonwealth or in any county, city or town thereof, classified under the civil service rules of the Commonwealth, shall hold such office or employment and shall not be removed therefrom . . . except for just cause and for reasons specifically given in writing", does not extend the term of employment of a police officer appointed by the mayor and aldermen of a city for a specified number of years fixed by the provisions of the city charter.

LATHROP, J. This is a petition for a writ of mandamus against the mayor of the city of Haverhill, the board of aldermen and the committee on police of that city, and also one Radcliffe, who was appointed a policeman of that city in place of the petitioner, on October 6, 1904. The relief prayed for is that a writ of mandamus should issue commanding all the respondents except Radcliffe to recognize the petitioner as a member of the police force of the city of Haverhill, to permit him to perform the duties of his office, and to cease to recognize Radcliffe. Relief is also prayed against Radcliffe, commanding him to abstain from acting as a member of the police force, and from usurping the office of the petitioner. The case was reserved by a single justice of this court, for our consideration, upon the pleadings and certain agreed facts.

The petitioner was duly appointed on the regular police force in the year 1890, and has continued as such until October 6, 1904, when the respondent Radcliffe was appointed in his place. The original appointment of the petitioner was under the provisions of the city charter, the St. of 1869, c. 61, § 12, as amended by the St. of 1887, c. 357. The original act gave to the mayor and

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aldermen "full and exclusive power to appoint a constable or constables, and a city marshal and assistants, with the powers and duties of constables, and all other police officers, and the same to remove at pleasure." The amendatory act inserted after the word "pleasure" the following: "provided that all members of the regular police force except the city marshal shall hold their respective offices until they resign therefrom or are removed by the mayor and aldermen for sufficient cause and after a due hearing."

The St. of 1894, c. 480, which took effect on July 1, 1895, in § 1 provides: "The police department of the city of Haverhill shall consist of the city marshal and such assistants and regular police officers as the mayor and aldermen shall from time to time determine." Section 2 provides, on July 1, 1895, and in the month of July in each fourth year thereafter, for the appointment of a marshal by the mayor, subject to confirmation by the board of aldermen, "whose term of office shall commence with the first Monday of July in the year of his appointment and continue for four years and until his successor has been confirmed." The section then proceeds as follows: "Said mayor shall also on said first Monday in July in the year eighteen hundred and ninety-five appoint, subject to like confirmation, the whole number of regular police officers authorized to be appointed in said city, and shall divide such number of appointees into four equal divisions, one division to serve for a term of one year, one division for a term of two years, one division for a term of three years and one division for a term of four years from the date of confirmation and until their respective successors are confirmed. And thereafter, as the terms of the regular police officers so appointed expire, the mayor shall appoint, subject to confirmation by said board, their successors for a term of four years."

This act, by § 8, was to take effect on July 1, 1895, provided it was accepted by the qualified voters of the city at the annual municipal election in December, 1894. The act was duly accepted. The city of Haverhill voted that the regular police force consist of twenty-eight men, and thereafter on July 1, 1895, the petitioner was duly appointed and confirmed as a regular police officer under the provisions of said act, and in the years 1896 and 1900 the petitioner was duly appointed and confirmed for terms

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of four years. The petitioner was also sworn to the faithful performance of his duties as an officer under these appointments. The last mentioned term of the petitioner expired on the first Monday of July, 1904, and he was not thereafter reappointed, but he continued to hold over until his successor was appointed on October 6, 1904.

The first contention of the petitioner is that as the St. of 1869, c. 61, § 12, as amended by the St. of 1887, c. 357, was not expressly repealed by the St. of 1894, c. 480, he could not be removed except for sufficient cause and after a due hearing. But we have no doubt that so much of the earlier statutes as related to the police force was repealed by implication by the St. of 1894, which covered the whole subject matter of the police force. *Bartlet* v. *King*, 12 Mass. 537, 545. *Ashley, appellant*, 4 Pick. 21, 23. *Nichols* v. *Squire*, 5 Pick. 168. *Commonwealth* v. *Cooley*, 10 Pick. 37, 39. *Commonwealth* v. *Kelliher*, 12 Allen, 480, 481.

The petitioner further contends that as the St. of 1894, c. 480, § 7, makes all appointments of regular police officers under the act subject to the provisions of the St. of 1884, c. 320, and the acts in amendment thereof and in addition thereto, he is entitled to his office under the St. of 1904, c. 314. Section 1 of this act reads as follows: "Every person holding office or employment in the public service of the Commonwealth or in any county, city or town thereof, classified under the civil service rules of the Commonwealth, shall hold such office or employment and shall not be removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other except for just cause and for reasons specifically given in writing."

It is agreed that the office or employment of a member of the regular police force of the city of Haverhill is and has been since March 30, 1885, an office or employment in the public service of the city classified under the civil service rules of the Commonwealth. But § 1 of the St. of 1904, c. 314, does not purport to change the provisions of the St. of 1894, c. 480, § 2, for the appointment of public officers, nor to limit or extend their term of office. We are of opinion that the words "shall hold such office or employment and shall not be removed therefrom" refer to the office or employment to which such person has been elected or

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appointed and to the term of such office or employment, and does not apply to an officer whose term of office has expired. Any other construction would enlarge an appointment for a term of years into a life tenure, provided it was a classified office under the civil service rules.

The agreed fact that the petitioner always considered himself as holding office under his original appointment of July 31, 1890, is wholly immaterial.

Petition denied.

J. J. Winn, for the petitioner.

E. S. Abbott, for the respondents.

HENRY A. McREA *vs.* HOOD RUBBER COMPANY.

Suffolk. January 13, 1905. — January 16, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

A workman in a rubber factory injured by falling when carrying an armful of rubber boots on his way to a chute, from slipping on a spot in a passageway of the factory where thin rubber cement has dripped in front of a tank, cannot recover from his employer for the injury, if it does not appear that the condition of the floor was due to any negligence on the part of his employer, and where, if it was due to the negligence of any one, it was that of one of his fellow servants.

In an action at common law and under the employers' liability act by a workman in a rubber factory against his employer for personal injuries from a fall caused by slipping on rubber cement alleged to have been allowed to remain on the floor of the factory through the defendant's negligence, evidence offered by the plaintiff, to show that a fellow workman of the plaintiff was furnished with sand and burlap to be used to prevent the floors becoming slippery from cement getting upon them, properly may be excluded as immaterial.

TORT by a rubber boot maker for injuries while in the defendant's employ from slipping and falling in a passageway of the defendant's factory which it was alleged that the defendant negligently allowed to become slippery, with counts at common law and under the employers' liability act. Writ dated November 21, 1902.

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At the trial in the Superior Court before *Wait*, J. the plaintiff testified that he was a rubber boot maker, and had worked for the defendant at its factory for about fifteen months before the accident; that on the morning of September 11, 1902, at ten minutes before eight o'clock, he was walking from his bench in the factory to a chute, carrying in his arms eleven pairs of men's rubber boots weighing between fifty and sixty pounds, it being his duty each morning to take from his bench the boots upon which he had worked the previous day and carry them to this chute by which they were conducted to lower floors of the factory.

Upon the morning in question the plaintiff was carrying the boots over the usual and shortest route from his bench. He had crossed the main aisle and had entered the passageway where on his way to the chute there were two barrel shaped tanks containing rubber cement. He had taken one step on this passageway, bringing him near the first of the two cement tanks, when he slipped and fell, breaking his leg and suffering the injuries sued for.

The plaintiff testified further that he noticed after his fall that the place on the floor where he slipped was covered with thin rubber cement for a space of about three feet square; that rubber cement is used by arctic makers and is made of naphtha, rubber and litharge, and when placed upon a floor or smooth surface is very slippery; that there was another way to go but that he had almost invariably since entering this shop fifteen months previous to the accident gone over this same route with his boots, and that he almost always had seen a man, whose name he did not know and whom he took to be an Armenian, engaged at work about the cement tanks, cleaning them, drawing cement and cleaning the floor of the passageway; that the Armenian was not near the tanks at the time of the accident, and that no one was near the tanks or in the passageway; that the light was good, the place where he fell being ten or twelve feet from the windows, and that the arctic makers always got their cement in the morning from half past six to half past seven o'clock.

The foreman in charge of this department of the factory, called as a witness by the plaintiff, testified that it was the duty of the Armenian under orders received from him to keep the cement

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tanks clean and also the floors near the tanks clean and free from cement, and that he had directed this Armenian to remain by this tank every morning from half past six until eight o'clock. The same witness was asked by the plaintiff "What, if any, appliances were furnished this man with which to keep the floors from becoming slippery?" This question was objected to by the defendant, and was excluded by the judge, the plaintiff excepting. It was the purpose of the plaintiff, in asking this question, to show that sand and burlap were furnished to this employee to be used upon the floors to keep them from becoming slippery by reason of cement getting upon them.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

H. H. Folsom, for the plaintiff.

J. A. Lowell, for the defendant.

BY THE COURT. There was no evidence of negligence on the part of the defendant. If the condition of the floor was due to the negligence of any one, it was that of a fellow servant of the plaintiff, for whose acts the defendant is not liable to the plaintiff.

The evidence offered and excluded was immaterial.

Exceptions overruled.

BENJAMIN E. BATES *vs.* BOSTON ELEVATED RAILWAY COMPANY & others.

Suffolk. June 21, 1904. — January 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Boston Elevated Railway Company. Damages. Equity Jurisdiction, To redeem chose in action, Marshalling of liens, Subrogation. *Mortgage.*

The persons entitled to damages from the Boston Elevated Railway Company under St. 1894, c. 548, § 8, are those having the interests described in the statute at the beginning of the construction of the railway of that company upon or in front of the premises for injury to which the damages are claimed.

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It is no defence to a bill in equity by a third mortgagee of land who has filed a petition under St. 1894, c. 548, § 8, for damages from the construction and operation of the railway of the Boston Elevated Railway Company, seeking to compel the first mortgagees of the same property to enforce payment of their debts out of the land before resorting to the damages from the railway company, and offering to redeem from the first mortgages, that before the filing of the bill the land was sold subject to the first mortgages under the foreclosure of a second mortgage, the plaintiff being present at the sale and declining to bid. Such a sale does not deprive the plaintiff of his right to redeem the chose in action.

A bill in equity by a third mortgagee of land, who has filed a petition under St. 1894, c. 548, § 8, for damages from the construction and operation of the railway of the Boston Elevated Railway Company, to redeem the claim against the railway company from underlying first mortgages, is not defeated by the entry of judgments in the Superior Court, after the filing of the bill, upon petitions of the first mortgagees giving them the entire damages assessed, or by the payment of these judgments, as under R. L. c. 48, § 114, and R. L. c. 111, §§ 112, 113, the court of law must assess entire damages and give judgment to each mortgagee in the order of his mortgage to the amount unpaid thereon, and has no jurisdiction to inquire into or adjust equitable rights, and the first mortgagees hold the payments received from the railway company subject to the plaintiff's right to have the burden of the first mortgage debts equitably apportioned between the land and the fund received as damages.

In a suit in equity by the holder of a third mortgage who has filed a petition for damages to his interest under a statute giving the right to such damages for injuries caused by the construction and operation of an elevated railway, against the holder of an underlying first mortgage to whom the entire damages assessed for the injury to the property have been paid, to compel him to collect his debt from the land instead of resorting to the damages, and seeking to redeem the claim for damages, if the plaintiff pays the first mortgage debt he is entitled to be subrogated to the rights of the first mortgagee both as to the land and the damages. If before the filing of the bill the land has been sold subject to the first mortgage under the foreclosure of a second mortgage, the plaintiff as against the purchaser of the land at the foreclosure sale can set up the lien of the first mortgage for such proportion of the first mortgage debt as the value of the land bears to the value of the fund received as damages.

BILL IN EQUITY, filed in the Superior Court on November 6, 1903, by the holder of a third mortgage upon four lots of land numbered 1686, 1688, 1690 and 1692 on Washington Street in Boston, who had filed a petition against the Boston Elevated Railway Company under St. 1894, c. 548, § 8, for damage to his interest in the land from the construction and operation of the railway of that company, against the railway company, George F. Blake, Edward C. Turner and the Boston Five Cents Savings Bank, respective holders of first mortgages on different portions of the property, Alfred P. Green, the former holder of a second mortgage on all the property and the purchaser of the

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equity of redemption at a foreclosure sale under his mortgage, and Benjamin A. Ball alleged to be the real owner represented by Green, all of these mortgagees and owners having filed petitions against the railway company for damages under St. 1894, c. 548, § 8; praying that the liens of the several defendants other than the railway company should be marshalled and those defendants ordered to enforce them against the land before resorting to their claims for damages against the railway company; that the plaintiff should be subrogated to the rights of the defendants under their respective mortgages to the extent of the amount received by them from the railway company and the extent of the plaintiff's claim; that the railway company should be enjoined from making settlements with the other defendants or paying them any damages until the plaintiff's rights should be determined; and for further relief.

In the Superior Court the case came on to be heard before *Gaskill*, J. upon the bill and the demurrers, pleas and answers of the several defendants and a general replication. At the request of the parties, the facts being admitted, the judge reported the case for determination by this court, such decree to be entered as law and equity might require.

The following statement of the plaintiff's contention was contained in the report:

The plaintiff contended that as mortgagee he had been greatly damaged, in that the value of his security had been wiped out and that he had a claim against the defendant railway company for compensation because of the damage caused by the location, construction, maintenance and operation of the elevated road, and a lien on the amount recovered; that, as he had lost his lien on the premises by reason of the foreclosure, and as the first mortgagees retained the security of their respective mortgages and also had a prior equity in the fund recovered from the railway company which they had enforced, he was entitled to be subrogated to the rights of these mortgagees under their respectives mortgages to the extent of his claim upon tendering to them the balances still unpaid upon their respective mortgages, which the plaintiff offered to do.

St. 1894, c. 548, § 8, is as follows: "The location, construc-

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tion, maintenance or operation of said lines of railway in any public or private way shall be deemed an additional servitude and entitle lessees, mortgagees and other parties having an estate in such way or in premises which abut thereon, and who are damaged by reason of the location, construction, maintenance and operation of said lines of railway, to recover reasonable compensation in the manner herein provided. Any such person may at any time within three years after the construction of such railway upon or in front of his premises, file in the clerk's office of the Superior Court for the county where his said premises lie, a petition setting forth his claim and the amount thereof against said corporation. He shall give to said corporation fourteen days' notice of the filing of such petition, and answer thereto shall be filed by said corporation within thirty days after the return day of such notice."

The case was submitted on briefs at the sitting of the court in June, 1904, and afterwards was submitted on briefs to all the justices.

B. E. Bates & J. D. Colt, for the plaintiff.

G. C. Travis & C. B. Gleason, for the railway company.

S. J. Elder & E. A. Whitman, for the defendants Blake, Turner, Green and Ball.

C. F. Kittredge, for the Boston Five Cents Savings Bank.

L. S. Dabney & E. M. Parker, by leave of court, filed a brief on behalf of the trustees under the will of James Parker.

J. R. Dunbar, H. M. Williams & H. M. Davis, also by leave of court, filed a brief on behalf of the trustees of the Terminal Hotel Trust, and on behalf of the Hammond Hotels Company, lessee of those trustees.

LORING, J. The plaintiff in this bill in equity held a third mortgage on four lots of land in respect of which compensation was due under St. 1894, c. 548, and St. 1897, c. 500, for injury done to it by the location, construction, maintenance and operation of the elevated railway. There were four first mortgages, one upon each of four lots which made up the estate covered by the plaintiff's mortgage. As matter of convenience these will be spoken of as the first mortgages. After petitions for compensation had been brought by the plaintiff, by the owner of the equity, and by one of the three first mortgagees, the second mortgage

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was foreclosed. Thereupon this bill was brought to have the first mortgagees directed to enforce payment of the amounts severally due them out of the land before resorting to the compensation due, or if they were allowed to resort to the compensation fund, the plaintiff might be subrogated to the lien of the first mortgages, which at the trial the plaintiff offered to redeem.

It appeared at the hearing that after the bill now before us was brought the petitions for compensation came on for trial, that a verdict was rendered by agreement for $17,500 as the damages to the mortgaged premises as a whole, and that judgments were entered directing $4,375 to be paid to each of the four first mortgagees. It also appeared that these judgments had been paid.

It was agreed that the value of the premises before the construction of the elevated railway was begun exceeded the amount of the first and second mortgages, and that at the time of the foreclosure of the second mortgage "the rental value of said premises had been greatly decreased and the rentals of said premises, if fully occupied, then amounted approximately to the sum of $6,960 per year and the yearly expenses, including interest on the mortgages underlying the plaintiff's, amounted approximately to $7,200. These facts were then known to the plaintiff and influenced him in deciding not to bid in the property, although present at the sale, and of sufficient financial ability to have purchased the property had he thought it advisable so to do."

The case is here on a reservation made by the Superior Court.

The first defence set up is that the mortgage to the plaintiff was made after the date when the right to compensation accrued, and for that reason he has no claim on that fund for injury to the land described in the bill.

The question of the date when the right to compensation accrues under St. 1894, c. 548, as amended by St. 1897, c. 500, is a question of great practical importance affecting parties in other cases. For this reason the court has taken briefs from persons not parties to this suit, whose rights are affected, and the question has been ably and exhaustively argued.

The defendant railway has argued with great confidence that

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the parties now entitled to compensation are those who owned the property when the right came into existence to do that for which compensation is given, and that in the case at bar this was on July 11, 1898, when the plans of the railway were approved by the railroad commissioners, "showing the form and method of construction proposed and the proposed location of the tracks, elevated structure and stations, with such detail as may be necessary to show the extent to which any street, way, avenue, bridge, public or private lands are to be encroached upon"; for upon such approval the railway company's right to erect the structure described in those plans opposite the premises in question and to operate a railway upon it became complete by force of St. 1897, c. 500, § 6. As to the clause of § 8 of St. 1894, c. 548, which provides that if a petition for compensation is brought it must be brought "at any time within three years after the construction of such railway upon or in front of his premises," the defendant railway's contention is that this is a limitation on the time when the action which had previously accrued must be brought, being in this respect somewhat analogous to the provision introduced into the highway act by St. 1842, c. 86, (extended by St. 1847, c. 259, § 4, to cases where selectmen laid out town ways,) in which it was enacted that the damages should not be paid until an actual entry was made on the land taken for the purpose of constructing the way, although the damages were due as soon as the way was laid out, and even though it never was built. *Harrington* v. *County Commissioners*, 22 Pick. 263. See also *Hallock* v. *Franklin*, 2 Met. 558.

In support of this contention this defendant also refers to the rule in case of railroads, namely, that the owner at the time of filing the location of the railroad is the person entitled to compensation; *Charlestown Branch Railroad* v. *County Commissioners*, 7 Met. 78; *Hampden Paint & Chemical Co.* v. *Springfield, Athol & Northeastern Railroad*, 124 Mass. 118; and it contends that this result was reached, in case of both highways and railroads, by the application of the rule for which it contends here, namely, that the persons entitled to compensation are those who own the property when the right becomes complete to do the thing for which compensation is given. It further contends that this is an established principle of law applicable to all cases

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where compensation is due by reason of the exercise of the power of eminent domain.

But the result arrived at in case of railroads and public ways was not reached by the application of a general principle of law; it was reached as a matter of the interpretation of the provisions adopted by the Legislature in the statutes there in question.

It was provided by Rev. Sts. c. 24, § 11, (under which the first case as to highways arose, *Harrington* v. *County Commissioners*, 22 Pick. 263,) that the county commissioners, in laying out a highway, should estimate the amount of damage sustained by any persons and should state the amount thereof in their return laying out the way; and also that if an application should be made for a jury to revise their award of damages it must be made within six months thereafter. Rev. Sts. c. 24, § 14. As matter of construction of that act the *punctum temporis* was held to be the lay out of the way. See also *Harding* v. *Medway*, 10 Met. 465; *Loring* v. *Boston*, 12 Gray, 209; *Edmands* v. *Boston*, 108 Mass. 535, 547. With the modification introduced by Sts. 1842, c. 86, and 1847, c. 259, § 4, already referred to, the provisions of the Revised Statutes were re-enacted in Gen. Sts. c. 43, §§ 14, 22, 62, 63, and Pub. Sts. c. 49, §§ 14, 33, 68, 69, 70. It was changed in the Revised Laws. It is there provided that no petition for a jury shall be brought until an entry is made upon the land taken for the purpose of constructing the way. R. L. c. 48, § 28; see also §§ 68, 80.

The rule in case of railroads was originally established by a decision as to when the three years within which a petition had to be brought began to run under Rev. Sts. c. 39, § 59. This statute provided that "no application to the commissioners to estimate said damages for land or property hereafter to be taken shall be sustained unless made within three years from the time of taking the same"; and it was held as matter of construction that the taking was the written location which had to be filed by the railroad company in the registry of deeds, defining the courses, distances and boundaries of the railroad location. *Charlestown Branch Railroad* v. *County Commissioners*, 7 Met. 78. In the subsequent case of *Hampden Paint & Chemical Co.* v. *Springfield, Athol & Northeastern Railroad*, 124 Mass. 118, it was held that the date as of which the damages were to be assessed was the date of filing the location.

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In case of the lay out of a public way and the location of a railroad a formal act of taking has to be made by the body which is authorized to exercise the power of eminent domain, and there was in each case (when the rule was established) a provision limiting the time within which a petition for compensation could be brought to so many months or years from that act — the return in case of highways and the location in case of railroads.

But there is another class of statutes, namely, statutes where the body empowered to act under the right of eminent domain is not required to make a formal taking, and where either the Legislature has expressly provided that the time within which a petition for compensation can be brought is to run from actual physical interference on the part of the person or body empowered to act under the power of eminent domain or this conclusion has been reached by the court as matter of construction. To this class belong *Ipswich Mills* v. *County Commissioners*, 108 Mass. 363, and *Heard* v. *Proprietors of Middlesex Canal*, 5 Met. 81, two of the cases relied on by the defendant railway; to which may be added *Call* v. *County Commissioners*, 2 Gray, 232.

A collection of statutes, where towns and other bodies have been authorized to take water without any formal act of taking, is to be found in *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365, 375, 376. For example, the time provided for filing a petition for compensation for the taking of water rights by the plaintiff corporation in *Gloucester Water Supply Co.* v. *Gloucester* was "within three years from the time the water is actually withdrawn or diverted," and it is there stated that such "is a common, if not a usual, form of limitation of such petitions." See p. 377.

In case of the elevated railway the Legislature might perhaps have considered as a taking the approval by the railroad commissioners of the plans specifying the kind of structure to be built, although that was not the primary purpose of that approval. But the Legislature did not do so. It provided that the time within which a petition for compensation should be brought should run neither from a taking nor from the approval of the plans by the railroad commissioners. What it did provide was that such a petition may be filed by a person entitled

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to compensation "at any time within three years after the construction of such railway upon or in front of his premises." In other words, the Legislature put the statute into the class of statutes where no taking is required, and where the time runs from the physical interference with the rights for which compensation is given. And as matter of construction we are of opinion that that is the time when the person entitled to compensation is to be ascertained, following the reasoning in *Charlestown Branch Railroad* v. *County Commissioners*, 7 Met. 78, and *Hampden Paint & Chemical Co.* v. *Springfield, Athol & Northeastern Railroad*, 124 Mass. 118, and the result as well as the reasoning reached in *Ipswich Mills* v. *County Commissioners*, 108 Mass. 363, *Heard* v. *Proprietors of Middlesex Canal*, 5 Met. 81, and *Call* v. *County Commissioners*, 2 Gray, 232.

It follows that under St. 1894, c. 548, and St. 1897, c. 500, the physical construction of the railway upon or in front of the premises in respect of which compensation is claimed is the date to be taken in determining who are entitled to compensation therefor.

The language of the act means on the face of it within three years after the construction at the point in question is completed. But it is apparent that the process of constructing the elevated structure in front of a store or a house probably would last some time. As matter of fact the work of laying the foundations opposite the premises in question began May 4, 1899, and was completed on May 11, 1899. The erection of the superstructure was begun on November 16, 1899, and was completed March 15, 1901, a period of one year and four months. The first train was run on May 1, 1901.

It is apparent that the buildings abutting on the streets through which the elevated railway could be built must have been largely in the hands of tenants, and also that this was recognized by the Legislature. "Lessees" are specially mentioned in the act (St. 1894, c. 548, § 8) as persons entitled to compensation. If we were to adopt as the true construction of the act the meaning which the words used bear on their face, compensation for loss of light and air during construction could not be claimed, and a lessee whose lease expired after the construction had been going on for over a year but yet expired just before the

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construction was completed would not be paid, although he may have suffered a serious damage of the kind for which by the act compensation is to be made. The act contemplates that compensation shall be made for damage done by construction apart from damage done by maintenance and operation. The first line of the act is in the disjunctive and the effect of that is not affected by the use of the conjunctive in the following sentence.

For these reasons we are of opinion that the date must be held to be the beginning of the construction of the railway. In the case at bar that date is May 4, 1899. The result in the case at bar is that the mortgage to the plaintiff was executed four months before the date when damages accrued under the act, and the first defence here set up fails. The plaintiff was a mortgagee within St. 1894, c. 548, § 8.

The defendants' next contention is that all rights of the plaintiff (the third mortgagee) were cut off by the foreclosure of the second mortgage. But a majority of the court are of opinion that this position is not well taken.

Where land taken or otherwise affected by the exercise of the power of eminent domain is under a mortgage or mortgages when compensation therefor becomes due, the compensation, in the absence of any statute on the matter, is at law the property of the mortgagor. *Breed* v. *Eastern Railroad*, 5 Gray, 470, n. *Farnsworth* v. *Boston*, 126 Mass. 1. In equity, however, the mortgagee can follow the land taken, and subject the proceeds, i. e. the compensation fund, to a lien for the payment of the mortgage debt due to him. This was decided in *Wood* v. *Westborough*, 140 Mass. 403. The doctrine is not one peculiar to cases where land is taken under the power of eminent domain. It rests upon the principle that although the land has been taken out of the mortgage by the paramount power of eminent domain, yet in equity the proceeds, that is to say, the compensation due, remains land and can be subjected to a lien for the payment of the mortgage debt. The doctrine is one of general application. The cases on it in this Commonwealth are collected in *Worcester* v. *Boston*, 179 Mass. 41, 50, and *Knowles* v. *Sullivan*, 182 Mass. 318.

But this matter has been regulated to some extent by statute. The first act on the subject was St. 1855, c. 247. That act gave

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to the court of law in which a petition for compensation was pending jurisdiction to administer this equitable right in all cases where the land mortgaged was taken for railroad purposes; and by St. 1881, c. 110, the provisions of that act were extended to all cases of mortgaged land taken for public uses under authority of law. These statutes followed and seem to have been caused by the decisions in *Breed* v. *Eastern Railroad*, 5 Gray, 470, n., and *Farnsworth* v. *Boston*, 126 Mass. 1, already referred to.

The effect of these enactments was settled in *Wood* v. *Westborough*, 140 Mass. 403. It was there held that they did not create new rights but gave to the court of law in which the compensation due was recovered jurisdiction to administer this equitable right of the mortgagee.

Such being the effect of the previous general act applying to all cases where mortgaged land was taken for public uses under authority of law, (St. 1881, c. 110,) the question arises whether the right to compensation given to mortgagees by St. 1894, c. 548, § 8, is the same or another and different right. We are of opinion that it is the same and not another or different right. It could not have been the intention of the Legislature, by mentioning mortgagees in § 8 of St. 1894, c. 548, to break in on the general system which previously had been adopted for all cases where mortgaged land is taken for public uses, and to give to mortgagees of land in respect of which compensation is due by reason of the elevated railway another and different right. Inasmuch as compensation is given by St. 1894, c. 548, for injury to what was not or may not have been a common law right, it was proper to mention mortgagees in § 8 and in that way to avoid any question of the statute's applying in case of a mortgage on land of an abutter who did not own the fee in the street, having regard to the language of St. 1881, c. 110, which in terms refers to land taken for public uses only.

This brings us to a consideration of the respective rights of the parties at law and in equity in the case at bar.

After a part of a parcel of land covered by a mortgage is taken for public uses, all that remains subject to the mortgage is the remaining land not taken. When the part taken is taken for public uses, the mortgagee's title to it is wiped out and the land

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taken is no longer subject to the mortgage; it has been withdrawn from the operation of the mortgage by title paramount. That is the situation at law. It follows that at law, in case the mortgagee undertakes to foreclose the mortgage by sale, all that is to be sold is the remaining land. That is all that remains for the mortgage to operate on as a common law conveyance, and it is as a common law conveyance that it is to be foreclosed. So far as the question is concerned what property it operates on, it is immaterial whether it is foreclosed by an entry *in pais*, a writ of entry, or a sale under a power. In equity, however, the mortgagee has a right to follow the land into the chose in action for the compensation due, and to subject that chose in action for the compensation due to a lien for the payment of the mortgage debt due to him. But that is an equitable lien which the mortgagee has in addition to his common law mortgage on the remaining land. See in this connection *Home Ins. Co.* v. *Smith*, 28 Hun, 296, 300, 301. It was held in *Gates* v. *de la Mare*, 142 N. Y. 307, that the right to the compensation due passed to a purchaser under a foreclosure sale. But in another case of land taken for the construction of the same street it was held that a conveyance of the land after the taking transferred the right to the compensation. *Magee* v. *Brooklyn*, 144 N. Y. 265. That is not the law in this Commonwealth. And apparently it is not law in New York, for it was said by O'Brien, J., in the latter case, that "The case has always been considered as *sui generis*, and the rights of the parties determined according to the peculiar facts and circumstances upon equitable principles." p. 268.

The situation is the same in the case at bar where the compensation is due for injury done the estate in place of being due for a taking of a portion of the land mortgaged. What was left after the land mortgaged was injured by the elevated railway was the land subject to the injury done by the elevated railway, which for convenience may be spoken of as the remaining land.

Before the foreclosure of the second mortgage took place, in the case at bar, the plaintiff as third mortgagee had a right to redeem the land which was subject to the first and second mortgages, and a right to redeem the chose in action for the compensation due, which also was subject to an equitable lien in favor of the first and second mortgagees. The two rights of redemp-

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tion were independent of each other in the same way that they would have been had they originally been brought into being by a mortgage at law on the land and an equitable lien on the chose in action for compensation due.

If the plaintiff thought that the sum bid at the foreclosure sale for the equity of redeeming the remaining land from the incumbrance of the first mortgage (which was all there was for sale in the foreclosure of the second mortgage) was as much as the remaining land subject to its share of the burden of the first mortgages was worth, he had a right to let that security be realized for payment of the second mortgage debt and to rely on his equitable lien on the chose in action for payment of the third mortgage debt due to him. See *George* v. *Wood*, 11 Allen, 41, where it was held that after a foreclosure of one of two parcels of land covered by the same mortgage the mortgagor could redeem by paying the balance of the debt due after deducting the value of the parcel foreclosed.

After the foreclosure of the second mortgage, the second mortgage debt was paid by the proceeds of the sale of the equity of redeeming the land from the first mortgages subject to the injury done by the elevated railway, which for convenience has been spoken of as the remaining land. That left the plaintiff with no rights in the remaining land, but with an equitable lien on the chose in action for the compensation due, subject only to the equitable lien of the first mortgagees thereon.

It was at this time that the bill now before us was filed.

The defendants contended that the right to redeem the chose in action for the compensation due, which the plaintiff had when the bill was filed, was lost when the Superior Court entered judgments in favor of the first mortgagees in the petitions to recover the compensation due; that the plaintiff was a party to those petitions, was in court at the time and made no objection to the entry of those judgments; that this appropriation is binding on the plaintiff and is final; and that by the payment under the judgment, if not by the judgment itself, the plaintiff's right in the chose in action came to an end. See Romer, J. in *Flint* v. *Howard*, [1893] 2 Ch. 54, 60, as to an appropriation by payment to a first mortgagee cutting off the right of a junior incumbrancer to redeem.

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But we are of opinion that neither the action of the Superior Court in rendering judgments for the first mortgagees nor the payment under it has cut off the plaintiff's right in the fund. A judgment entered by the Superior Court under R. L. c. 48, § 114, (re-enacting St. 1881, c. 110,) and R. L. c. 111, §§ 112, 113, (re-enacting St. 1855, c. 247,) is ordinarily final and binding on the persons who are parties to the petitions. See *Wood* v. *Westborough*, 140 Mass. 403, 410. But the jurisdiction given by these statutes to courts of law to administer the equitable rights of the mortgagee in regard to the compensation due in respect of the mortgaged land is a restricted one. Under the statutes no discretion is given to the court of law. The statutes are mandatory that judgment shall be entered in favor of the several mortgagees in the order of their priority. The court of law has no jurisdiction to inquire into and adjust the equitable rights, if any, between the several mortgagees where the mortgage debts are also secured by liens on other funds. If such rights exist they must be enforced by a court of general equity jurisdiction. The Superior Court therefore was right in refusing to postpone the trial of the petitions for compensation until the bill in equity now before us was heard, on the ground that the plaintiff's rights would not be prejudiced thereby. The plaintiff's right to redeem was preserved by the fact that the bill now before us was pending when the judgments were rendered.

The answer to the contention that the payment ended the plaintiff's rights is the same. While this bill was pending the first mortgagees ought not to have applied, in reduction *pro tanto* of the respective debts due them severally, the money paid to them, and if the statement in the report is to be taken to mean that they have done so in fact, since they ought not to have done so, they must stand, as against the plaintiff in this bill in equity, as not having done so.

To redeem, the plaintiff must pay the whole of the first mortgage debt. On so doing, had the mortgagor been the only other person interested, he would have been subrogated to the lien of the first mortgagees, and could have set up those mortgages for the amounts due thereon respectively, without regard to the payments made by the elevated railway. But the plaintiff seeks to set up the first mortgages and throw the whole burden of pay-

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ing the first mortgage debts not on the mortgagor but on the purchaser of the land at the foreclosure sale under the second mortgage. There is no reason why the whole burden of the first mortgage debts should be borne by the land now owned by the defendant Green who bought it at the foreclosure sale under the second mortgage rather than by the plaintiff who has a lien on the chose in action for the compensation due; and conversely there is no reason why it should be borne by the plaintiff rather than by Green, unless the sale was made under some condition which does not appear in the agreed facts before us. Their rights in this respect are equal, and the burden of the first mortgages should be apportioned between the land and the compensation fund, proportionally to the value of the land subject to the injury done by the elevated railway free of incumbrances and the amount of the compensation fund due for that injury. The case comes within *Flint* v. *Howard*, [1893] 2 Ch. 54; *Barnes* v. *Racster*, 1 Y. & C. Ch. 401; *Bugden* v. *Bignold*, 2 Y. & C. Ch. 377.

In the opinion of a majority of the court there must be a decree accordingly.

So ordered.

COMMONWEALTH *vs.* JOSEPH MIDDLEBY & others.

Suffolk. November 14, 1904. — January 30, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Attachment. Practice, Criminal, Exceptions. *Evidence,* Materiality. *Assault and Battery. Witness,* Cross-examination.

Whether a deputy sheriff attached all the goods in a wholesale warehouse on a writ against the proprietor, after the proprietor had told him to go ahead and attach but that some of the goods were not his, or whether the attachment was only of a part of the goods, is a question of fact to be decided by a jury on consideration of what was said and done at the time as disclosed by the evidence.

An exception by a defendant in a criminal case cannot be sustained to an instruction of the presiding judge, which properly interpreted is correct, on the ground that it might have been misunderstood by the jury, if the defendant did not call the judge's attention to the matter at the trial and ask him to make the instruction more plain.

A deputy sheriff attaching goods in a wholesale warehouse has a right to make a

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schedule of the goods before removing them, although after the goods attached are ascertained he cannot keep them on the premises.

On the question of what is a reasonable time to be taken by a deputy sheriff and his assistants in removing goods attached in a wholesale warehouse, it is proper to refuse to allow the proprietor, an experienced shipper familiar with the premises, to testify in his own behalf how long it would take to remove them.

The rights of the owner of goods attached as against the attaching officer and his assistants are in no way affected by the right of the officer to ask for instructions as to the property to be attached from the plaintiff on whose writ he is making the attachment.

It is no defence to a complaint for assault and battery that the defendant was acting under the advice of counsel, which turned out not to be correct.

It is within the discretion of the presiding judge at the trial of two defendants for assault and battery, one of whom has testified in his own behalf that he took no part in the assault, to allow the government to ask this defendant on cross-examination whether he did not approve of the assault, for the purpose of impeaching his credibility as a witness, although the silent approval of an assault and battery is no crime.

COMPLAINT, received and sworn to in the Municipal Court of the City of Boston on November 21, 1902, against Joseph Middleby, Jeremiah J. McCarthy and another man described as a person whose name was unknown, afterwards shown to be Charles Middleby, son of Joseph, for assault and battery upon Joseph E. Donovan and Thomas J. Dooley.

On appeal to the Superior Court the case was tried before *Bond*, J. It appeared, that at about half past one o'clock on the afternoon of November 20, 1902, one Francis Martin, a deputy sheriff, made an attachment in an action brought by one Hallett of the property of the defendant Joseph Middleby, and placed a keeper in his warehouse at No. 201 on State Street in Boston where he carried on the business of a wholesale dealer in baker's supplies. The defendants contended that the only property attached by Martin was thirty-one barrels of sugar, and the Commonwealth contended that all the goods in the warehouse belonging to the defendant Joseph Middleby were under attachment. The defendant Joseph Middleby said to Martin "Very well, go ahead and attach, but some of the goods are not mine," and refused to tell him which goods were his. Immediately after the attachment was made, Joseph Middleby notified Martin to remove the property attached or the keeper. Thereupon the sheriff sent his clerk, one Donovan, to the premises with directions to make a schedule of the property preparatory to its removal, and later sent one Dooley to assist Donovan in preparing

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the schedule. It appeared that Donovan reached the warehouse at about half past two o'clock and Dooley at about four o'clock on the afternoon of the day in question. From the time of their respective arrivals on the premises until about five o'clock on that afternoon Donovan and Dooley were engaged in making a schedule of thirty-one barrels of sugar, taking the weights and markings on each barrel, and of about five hundred pails of pie filling and jam. There was evidence on the part of the Commonwealth that this list-making proceeded properly and with diligence, while the defendants contended that Donovan and Dooley were dilatory and negligent, and acted in bad faith. Shortly before five o'clock, while Dooley was moving a box of raisins belonging to the defendant he spilled some of the raisins, and soon after the defendants ejected him from the premises, he making but slight resistance and not being injured. This constituted the assault and battery alleged in the complaint.

The defendant Joseph Middleby testified on his own behalf that he was not present at the putting out of Dooley, gave no order for it and took no part in it, but was in his office some thirty or forty feet away. On cross-examination he was asked "Now, if he was seized and put out, it was done with your approval, wasn't it"? This question was objected to by the defendant Joseph Middleby, and was allowed by the judge. The defendant answered as follows: "*A.* I knew nothing about its being done; after it was done, I did know. *Q.* You did then approve of it? *A.* Yes, sir; I did."

Upon the evidence the counsel for the defendants requested the judge to instruct the jury that the only property attached was the thirty-one barrels of sugar. This the judge refused to do, and the defendants excepted.

It was contended in behalf of the defendants that the pails of pie filling, jam and raisins were not under attachment, and that as to them Dooley was a trespasser and was ejected lawfully from the warehouse while handling these goods.

The defendants asked the judge to make the following rulings:

1. That if the jury shall find that the deputy sheriff, upon receiving the notice served upon him by Joseph Middleby, and the latter's declining to point out to him what was his property, had

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reasonable ground to believe that in making an attachment under the writ at the store he might make a mistake and expose himself to an action for damages by attaching property wrongfully, it was thereupon the duty of the deputy sheriff to require the plaintiff Hallett to show him the property of the defendant Joseph Middleby to be attached under the writ, and also, if he chose, to require of Hallett a bond to protect him against any mistake made in conforming to Hallett's direction.

2. That Dooley, not being on the defendant Joseph Middleby's premises as a keeper of the sugar, was a trespasser, and all the defendants had the right to treat him as a trespasser. [This exception was waived.]

3. That the taking of a schedule of the personal property, being for the convenience of the officer, the officer had no right to use the premises of the defendant Joseph Middleby for the purpose, and that it was incumbent upon the deputy sheriff forthwith to have removed merchandise or personal property to the amount of $2,000 from the premises of the defendant Joseph Middleby within a reasonable time.

4. Such reasonable time is the time usually necessary for the removal of such merchandise and property according to the usage of the business in which the defendant Joseph Middleby was engaged.

5. As to Joseph Middleby, if he acted in good faith and under the direction of his counsel and without express malice, the verdict must be for that defendant.

6. If the defendants Joseph Middleby and Charles Middleby, or either of them, acted in good faith under the advice of their attorney, Mr. McCarthy, there is no presumption of criminal intent, and unless such intent is proved by the government the verdict must be for the defendants.

7. The occupation by Martin, deputy sheriff, of the warehouse of the defendant Joseph Middleby at 201 State Street, Boston, with a keeper for over three hours in the afternoon during business hours, between the hours of half past one and five o'clock, without making any attempt to begin to remove the goods was, as a matter of law, unreasonable, and made Martin and all persons claiming to be there by or under him trespassers.

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8. That the defendant Charles Middleby, being the son of the defendant Joseph Middleby, had a right to protect the property of his father against the acts of Dooley and Donovan, or either of them, if they or either of them were carelessly or wilfully destroying or injuring the same, or if they failed on demand to show a written deputation from the deputy sheriff, or if they refused to give reasons for their presence when asked.

The judge refused to make any of these rulings in the form requested, and gave certain other instructions which so far as material are mentioned in the opinion. The jury returned a verdict that the defendants Joseph Middleby and Charles Middleby were guilty of the charge set forth in the complaint, and that the defendant McCarthy was not guilty. The defendants Joseph Middleby and Charles Middleby alleged exceptions.

J. K. Berry, (*E. C. Upton* with him,) for the defendants Middleby.

F. H. Chase, Second Assistant District Attorney, for the Commonwealth, submitted a brief.

LORING, J. 1. The presiding judge was right in refusing to rule as matter of law that only the sugar was attached. The ground on which the defendants support their contention here is that the only interpretation which could be put on what took place was that the officer determined to and did take into his possession nothing but the sugar because he was frightened by Joseph Middleby's notice that some of the property was not his, although it turned out that the sugar was worth no more than $500 to $600 and the *ad damnum* of the writ was $2,000. We are of opinion that the jury were warranted in finding that the sheriff took into his possession and left in the custody of the keeper all the stock in trade on the first floor of the store at least, with instructions to release such articles as Middleby wished to ship away before they were scheduled, but not to release the sugar.

The exception to so much of the charge as deals with the question whether more than the thirty-one barrels of sugar were attached must be overruled.

Whether Martin took into his possession and kept in his custody more than the sugar was a question of fact depending on the inferences to be drawn from the evidence, and properly was left to the jury.

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2. The presiding judge did not tell the jury that the question of what was attached depended upon what Middleby understood was attached. What he did tell the jury was that in determining what took place they could consider what was said or what was not said at the time by Middleby. That is all that was meant by the presiding judge when he told the jury that they might consider whether or not, "if it had been understood by the owner of the property that nothing was attached but the sugar, . . . some remark of that kind would not have been made." This particular matter was not brought to the attention of the judge. If the defendants thought that this was misleading they should have brought it to the judge's attention, so that it could be stated more plainly.

3. So of the exception to that portion of the charge in which the judge, in instructing the jury as to whether more was attached than the sugar, asked them whether the fact that more was attached was made known to Joseph Middleby. Also in telling them that in considering what effect was to be given to what was done they could take into consideration all the circumstances including the prior negotiations for a bond. An officer cannot make an attachment by an undisclosed mental process. Whether the officer did take possession of more than the sugar was a fact. That was what was meant by this portion of the charge, and here again this particular matter was not brought to the attention of the judge to be corrected if not altogether plain.

4. Joseph Middleby properly was not allowed to testify as to how long a time would be required to take out from the store thirty-one barrels of sugar and one load of pie filling and to put them on the wagons. In the first place the deputy sheriff was not bound to remove the goods attached before making a schedule of them, and in the second place the question in regard to handling the goods with which the jury had to deal was not how long a time would be required by an experienced shipper familiar with the premises, but how long a time would be taken by a deputy sheriff and his assistants.

5. The question of unreasonable delay properly was left to the jury under all the circumstances, including Middleby's notice as to ownership, which in itself justified proceeding with more than

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usual caution. The judge did not assume that the pie filling and jam were attached, but left that to be determined by the jury. Nor did he instruct the jury that the deputy sheriff had a right to send Dooley there to assist in maintaining his possession. What he did say was that he could maintain Dooley's presence on the premises when he was acting for him in making a schedule. The instruction was right that the deputy sheriff had a right to schedule the goods before removing them, although after the goods attached are ascertained he cannot keep them on the premises. *Steuer* v. *Maguire*, 182 Mass. 575, 577. *Williams* v. *Powell*, 101 Mass. 467. *Davis* v. *Stone*, 120 Mass. 228. The attempt of Middleby to embarrass the officer by telling him to act at his peril and at the same time to hold him to speedy action is plain. The attempt is not to be looked upon with favor. This covers the refusal to give the third ruling asked for.

6. The rights of Joseph Middleby on the one side and of the deputy sheriff and his assistants on the other do not depend on the deputy's right to ask for instructions from Hallett. That matter is immaterial, and the first ruling requested, if given, might have been misleading.

7. Middleby's contention that if he wrongfully commits assault and battery on a man under bad advice, the assault and battery are not wrongful and he is not guilty of a criminal assault and battery, is not law. Such a man is guilty unless he in fact had a justification. *Commonwealth* v. *Randall*, 4 Gray, 36. *Commonwealth* v. *Rigney*, 4 Allen, 316. What was said in *Commonwealth* v. *Ruggles*, 6 Allen, 588, 590, relied on by the defendants was with reference to the question whether a man who lawfully was resisting being put off a highway on which he had a right to be could be arrested for assault and battery.

8. Finally, the exception on the question put to Joseph Middleby on cross-examination must be overruled. Of course this defendant could not be convicted for silent approval of the assault and battery committed by others. But on the question of the credit to be given to his testimony it was competent for the presiding judge in his discretion to allow the government to show his attitude toward the assault and battery which was committed.

Exceptions overruled.

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MARY W. DUGGAN *vs.* INHABITANTS OF PEABODY.
JAMES DUGGAN *vs.* SAME.

Essex. November 3, 1904. — February 14, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Municipal Corporations, Officers and agents, Liabilities, Powers.

Semble, that it is not within the ordinary authority of the superintendent of streets of a town as a public officer to purchase real estate to be paid for by the town and used as a stone quarry or to take charge of such a quarry belonging to the town and carry on the business of quarrying and crushing stone there, even for use upon the public streets.

Where a town owns and maintains a stone quarry, quarrying and crushing stone there for use upon its public streets and from time to time making sales of broken stone and turning the proceeds into the town treasury, the town is liable to a person injured by a piece of stone thrown from a blast in the quarry due to the negligence of the superintendent of streets in charge of the work.

Where a town owns and maintains a stone quarry for the purpose of quarrying and crushing stone for use upon its public streets, incidental sales of broken stone for profit are not *ultra vires* but legitimate.

Where a town owning and maintaining a stone quarry for the purpose of quarrying and crushing stone for use upon its public streets carries on for years in an open way the business of selling broken stone from the quarry, and this is annually referred to in the reports of the selectmen and the town treasurer made to the inhabitants at town meetings and presumably accepted, and the reports also are published and distributed among the inhabitants, this is sufficient evidence that the business of selling broken stone is conducted with the approval of the town and that the acts of its agents appearing in the reports have been ratified.

TWO ACTIONS OF TORT, one by Mary W. Duggan for personal injuries from being struck on the head by a piece of stone from a blast in the stone quarry of the defendant maintained for the preparation of stone to be used in repairs of highways, and the other by James Duggan, husband of Mary, for the loss of her services and companionship by reason of the injuries. Writs dated June 27, 1901.

In the Superior Court the cases were tried together before *Sherman*, J., who refused to order verdicts for the defendant or to make certain other rulings requested by the defendant. The jury returned a verdict for each plaintiff, in the first case in the sum of $1,000 and in the second case in the sum of $500. The defendant alleged exceptions.

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J. J. Cahill & D. N. Crowley, for the defendant.

W. H. Niles, for the plaintiffs.

KNOWLTON, C. J. The plaintiff in the first case, while on her own premises not far from the defendant's quarry, was struck on the head and injured by a stone thrown from a blast in the quarry, and her husband James Duggan suffered damages on account of her injuries. It was conceded by the defendant at the trial, that she was in the exercise of due care, and that the blast was negligently exploded.

One Hooper, who was the superintendent of streets duly appointed by the selectmen, was in charge of the work, and the only question is whether the defendant is liable for his negligence. For his negligence as a public officer, acting under the authority of law in the performance of the duties of his office in regard to matters which involve no element of profit or income to the town, but were imposed solely in the interest of the general public, the town is not liable. *Hafford* v. *New Bedford*, 16 Gray, 297. *Walcott* v. *Swampscott*, 1 Allen, 101. *Buttrick* v. *Lowell*, 1 Allen, 172. If the enterprise in which he was engaged was conducted primarily as a work of the town, imposed upon it for the benefit of the public, but in part as a source of income, a commercial element was introduced which made him to that extent at least an agent of the town, and which deprived the town of the exemption from liability for negligence which pertains to the performance of duties that are strictly public.

The purchase of real estate, to be paid for by a town and used as a stone quarry, is not ordinarily within the authority of a superintendent of streets acting merely as a public officer, and as such an officer he probably would have no right to take in charge such a quarry belonging to a town to carry on the business of quarrying and crushing stone there, even for use upon the public streets, unless the town authorized or permitted him to do so. In the present case the town has for years been making sales of broken stone from this quarry. In the year ending January 15, 1898, there were three sales amounting to $11.50. In the next year there were seven sales amounting to $189.37, in the next year six sales amounting to $460.88, in the next year twelve sales amounting to $1,193.65, and in the year of the accident there were twenty-four sales amounting to $352.40. The

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money received for these sales went into the hands of the town treasurer, some of it by payments to him directly and some through the superintendent of streets. In his annual reports to the town, the treasurer accounted for all these moneys, and the amounts so received also appeared in the annual town report published by the selectmen. We think these facts bring the case within the principles stated in *Collins* v. *Greenfield*, 172 Mass. 78, *Neff* v. *Wellesley*, 148 Mass. 487, 493, and *Worden* v. *New Bedford*, 131 Mass. 23. See also *Waldron* v. *Haverhill*, 143 Mass. 582; *Sullivan* v. *Holyoke*, 135 Mass. 273, 277; *Oliver* v. *Worcester*, 102 Mass. 489, 500; *Norton* v. *New Bedford*, 166 Mass. 48, 52; *Hawks* v. *Charlemont*, 107 Mass. 414; *Aldrich* v. *Tripp*, 11 R. I. 141.

In *Neff* v. *Wellesley*, *ubi supra*, the principle is stated as follows: "When property is used or business is conducted by a town principally for public purposes, under the authority of the law, but incidentally and in part for profit, the town is liable for negligence in the management of it." In *Collins* v. *Greenfield*, *ubi supra*, the plaintiff's intestate was injured while at work about a stone crusher in preparing stone for use in macadamizing streets. Some income was received from the business, derived in part from payments of a street railway company and in part from small sales of crushed stone. The work was in charge of the superintendent of streets. It was held that the town was liable for his negligence. The same principle is applied in *Worden* v. *New Bedford*, *ubi supra*, and in other cases. In *Murphy* v. *Needham*, 176 Mass. 422, the plaintiff's intestate was injured while engaged in getting out gravel in a gravel pit, and the facts in regard to the crushed stone were held to be too remote to affect the plaintiff's case.

It was contended in *Neff* v. *Wellesley* and in *Worden* v. *New Bedford*, and in other cases, that there was no liability because the use of the property for profit was *ultra vires*; but the defence was not sustained, as it was held that an incidental use resulting in profit, from property acquired and held primarily for a public purpose, was legitimate. See also, as overruling this defence on another ground, *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177. It is objected that there was no vote of the town authorizing the sale of crushed stone, or particularly referring to it.

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But the business was carried on for years in an open way, and was annually referred to in the reports of the selectmen and town treasurer, made to the inhabitants in town meeting assembled, and presumably accepted by votes of the town. The reports were also published and distributed among the inhabitants. This is sufficient evidence to warrant a finding that the business was conducted with the approval of the town, and that the acts of its agents appearing in the reports were ratified. *Arlington* v. *Peirce*, 122 Mass. 270. The case is very different from *Wormstead* v. *Lynn*, 184 Mass. 425, in which the plaintiff, in an action of contract against the city, relied on a previous habit of the superintendent of streets to make certain contracts without authority, which, so far as appeared, never had been brought to the knowledge of the city council or ratified in any way by municipal action of the defendant.

In this case we have no occasion to consider whether there is a special liability founded on the use of an explosive which is intrinsically dangerous to persons and property in the vicinity who are not connected with the work. We are of opinion that the cases were properly submitted to the jury.

Judgment for the plaintiffs.

GREENFIELD AND TURNERS FALLS STREET RAILWAY COMPANY *vs.* INHABITANTS OF GREENFIELD.

D. OSCAR LOVELL *vs.* GREENFIELD AND TURNERS FALLS STREET RAILWAY COMPANY.

Franklin. September 20, 1904. — February 27, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Tax. Street Railway.

In computing the annual gross receipts for each mile of track of a street railway company for the purpose of determining the rate at which an excise tax should be assessed under R. L. c. 14, § 44, the assessors must include all tracks operated by the railway company on private lands outside the limits of any public highway as well as those on public ways.

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BARKER, J. The actions are a petition of the company for the abatement of a tax assessed just before November 1, 1902, by the assessors of Greenfield upon a proportion of its gross receipts for the year ending September 30, 1902, at the rate of two per cent, the assessors claiming to act in accordance with the provisions of R. L. c. 14, § 44, and an action of contract by the collector of Greenfield to recover the amount of the tax so assessed.

The cases were heard in the Superior Court on an agreed statement of facts with judgment in each case against the railway company, and are before us upon the company's appeal.

The question for decision is whether the company's "annual gross receipts for each mile of track . . . computed upon the aggregate of said annual gross receipts", within the meaning of the second paragraph of § 44 of R. L. c. 14, were more or less than $4,000. If more than that sum, the percentage of two per cent used by the assessors in laying the tax was right, and the company's petition for abatement should be denied and the judgment against the company for the amount of the tax should be affirmed. If less than $4,000 per mile the rate should have been one per cent instead of two, and the company is entitled to relief.

The contention of the town is that in order to obtain the percentages under the second paragraph of § 44, "the annual gross receipts for each mile of track" are to be computed by dividing the annual gross receipts for the year ending on the preceding thirtieth of September by the number of miles of track operated by the company in public streets only. In the present instance it is agreed that that number of miles was eleven and two hundred and thirteen one thousandths and that the gross receipts were $49,349.11, or more than $4,000 per mile, so computed. There were three and eight hundred and sixty-two one thousandths miles of track operated by the company on private land without the limits of any public highway. The contention of the company is that the percentage is to be obtained by dividing the annual gross receipts of $49,349.11 by the whole number of miles of track operated, which it is agreed was fifteen and seventy-five one thousandths miles, in which case the annual gross receipts for each mile of track were less than $4,000, and the true percentage was one instead of two per cent.

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The question involved is of considerable importance for the reason that in the year 1902 there were more than sixty street railway corporations in the State, having some part of their tracks outside of the public ways, and liable to assessment under the section in at least two hundred and eighty-one cities or towns, and that the percentage of gross receipts to be used by the assessors of these places in laying taxes under § 44 may in any instance be made greater or less in accordance with the construction to be given to the section.

In construing a statute we ordinarily are to give the language its usual meaning. It is conceded that if the decision depended upon the words of the second paragraph of the section alone we must hold that the total length of all track would be the divisor and the entire earnings the dividend. There can be no question that such is the ordinary meaning of the words "gross receipts for each mile of track."

It is also conceded that this section is a re-enactment of St. 1898, c. 578, § 7, without change of meaning. The words used in the second paragraph of that section are "annual gross receipts per mile of track operated", the words "and computed upon the aggregate of said annual gross receipts" having been inserted by the revising commissioners in their draft, evidently because there was only authority by implication in St. 1898, c. 578, § 7, to make the computation of gross receipts per mile, and no specific authority. See Commissioners' Report, c. 14, § 45, lines 13 and 14.

The argument in support of the contention of the town is that in the return to the local assessors required of the company by R. L. c. 14, § 43, the total length of track operated by it is not required to be stated, while the length of track operated by it in public ways in the particular city or town and also the total length of track operated by it in all public ways are to be stated. It is assumed that the statements of the return are the only data before the assessors from which to make the assessment. But they have other means of information.

The necessity of some return to the assessors comes from this: First, no other return than that to be made to them states the length of track operated by the company in public ways in the particular city or town whose assessors are to lay the tax, and

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without that return the proportion which they are required by the first paragraph of § 44 to use in making the assessment could not be determined. Second, the gross receipts for the year ending on the preceding thirtieth of September would not be accessible from the returns to the railroad commissioners in season for the laying of the tax on or before the first day of November, without the return to the assessors.

Neither § 7 of c. 578 of St. 1898, nor § 44 of c. 14 of the Revised Laws, requires the assessors to lay the tax upon the return made to them by the company. That return is like the list of taxable property required by statute to be made by every property holder for the information of the assessors, and no more limits or binds them than does the taxpayers' list. The rule of assessment is given in § 44, and in applying it the assessors are to use any information within reach. Because there is within their reach material for making every computation necessary in assessing the tax as directed by the language of § 7 of the original act and of § 44 of R. L. c. 14, it is not a sound construction to impute to that language a sense other than the ordinary and usual meaning of the words.

The argument from the provisions of § 45 is of no weight. The provision there made for a revision of the tax by the board of railroad commissioners may be availed of in any and every instance, and the fact that there is such a provision has no bearing whatever upon the question how § 44 should be construed.

We are of opinion that the company is entitled to an abatement upon its petition of one half of the amount of tax assessed against it and that it is entitled to judgment in the other action.

So ordered.

The case was argued at the bar in September, 1904, before *Knowlton*, C. J., *Barker*, *Hammond*, *Loring*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

E. W. Hardy, for the street railway company.

D. Malone, for the town of Greenfield and D. Oscar Lovell.

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ANN SHEEHAN *vs.* CITY OF FALL RIVER.

Bristol. October 25, 1904. — February 27, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Damages. Grade Crossing Acts. Landlord and Tenant.

Under St. 1900, c. 472, a special act providing for the abolition of certain grade crossings in Fall River and incorporating the provisions of the general grade crossing acts in regard to damages, the owner of a wooden building standing on the land of another, holding the land under the building as a tenant at will, is entitled to damages for injury to the building and to his estate at will from a change of grade in a public way on which his building abuts. In assessing such damages the nature of the petitioner's title and the right of the owner of the land to terminate the tenancy by grant or by giving the notice required by statute should be considered.

One owning a building abutting on a street, the grade of which has been changed in the abolition of a grade crossing, is entitled under the provisions of the grade crossing acts to damages for impairment of the use of his building by access to it being made more difficult although not entirely cut off while the work was going on, this being a special and peculiar injury not shared by the public.

PETITION, filed August 8, 1902, by the owner of a building on the west side of Davol Street in the city of Fall River, standing on land held by the petitioner under "an oral lease from year to year at an annual rental payable in monthly instalments," for the assessment of damages under St. 1900, c. 472.

In the Superior Court the case was tried before *Harris*, J., who ruled that the petitioner could not recover, and ordered a verdict for the respondent. At the request of the parties the judge reported the case for determination by this court. It was agreed that the damage to the petitioner for interference with access to her building was $25, and that "if the petitioner could, in law, suffer any other damage, the amount of the damage was $409." It also was agreed that a settlement had been made by the respondent with the owners of the real estate, but that in that settlement nothing was paid for the injury to the petitioner's property, and the damages to the petitioner's property formed no part of the consideration of that settlement, and that if one person owned both the land and the buildings, the damages to both land and buildings would be $434 more than was

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paid to the owners of the land. The petitioner still occupied the premises under her oral lease. If the petitioner could recover both amounts judgment was to be entered for the petitioner for $434, if only one amount for that amount, with interest from January 1, 1902. If the petitioner could not recover, judgment was to be entered for the respondent.

J. W. Cummings & C. R. Cummings, for the petitioner.

F. S. Hall, (*H. A. Dubuque* with him,) for the respondent.

BRALEY, J. Under the provisions of St. 1900, c. 472, the grade of the street on which the petitioner's building abutted was lowered, by which substantial alterations were required to adjust the property so that it could be used conveniently. Her estate or interest in the land on which it stood being created by a parol lease she was a tenant at will. Pub. Sts. c. 120, § 3.

If she is entitled to recover damages caused by changing the grade they must be assessed for injury to her estate, which for this purpose includes not only the building, but her right to the possession of the land. The respondent, indeed, does not deny that her property has been damaged, but relies solely on the defence that there is no remedy for the injury, and this presents the main question to be decided.

Before relief is denied the laws relating to the abolition of grade crossings must receive a construction in the case before us which limits their application to an estate in lands created by a formal written instrument, and refuses compensation for damages to similar property when held by parol tenure.

The provisions of St. 1890, c. 428, § 5, as amended by St. 1891, c. 123, § 1, providing for the payment of damages either for land taken, change of grade, or the discontinuance of a public way, and to which reference is made in the special act under which this work was done, refer for their application to Pub. Sts. c. 49, §§ 14 and 16, and c. 112, § 95. It was provided by the original statute that "All damages sustained by any person in his property . . . by the alteration of the grade of, a public way", if the parties interested cannot agree, are to be ascertained in the same manner and under like rules of law which obtain as to the assessment of damages "when occasioned by the taking of land for the locating and laying out of railroads and public ways." Whether this double reference only points

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out the method of procedure or indicates the extent to which damages may be awarded is not of importance, as under all these statutes the provisions for compensation are substantially similar. *Natick Gas Light Co.* v. *Natick*, 175 Mass. 246, 247, 248. *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180.

The right to compensation arising under remedial statutes of this character has not been limited to the landowner alone, whose land is taken, but has been extended to include those having an interest in real property that is injured, though not taken, nor abutting on lands that have been taken. *Ashby* v. *Eastern Railroad*, 5 Met. 368, 372. *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107. *Marsden* v. *Cambridge*, 114 Mass. 490. *Trowbridge* v. *Brookline*, 144 Mass. 139, 141. *Sheldon* v. *Boston & Albany Railroad*, *ubi supra*. *Putnam* v. *Boston & Providence Railroad*, 182 Mass. 351, 353, and cases cited. *Munn* v. *Boston*, 183 Mass. 421.

An equally extensive right of recovery has been recognized for damages caused by a change of grade in making specific repairs under Pub. Sts. c. 49, §§ 68, 69, *Collins* v. *Waltham*, 151 Mass. 196, 198, *Dana* v. *Boston*, 170 Mass. 593, 595, and also under similar language in the metropolitan sewerage act, St. 1889, c. 439, as amended by St. 1890, c. 270. *Penney* v. *Commonwealth*, 173 Mass. 507, 510.

An examination of the cases on which the respondent principally relies fails to show any narrowing of this rule of construction, or any decision which prevents the petitioner from recovering damages.

In the case of *Rand* v. *Boston*, 164 Mass. 354, there was no alteration of grade, and the petitioners' estate was not affected by any structural change in the street, while in *New York, New Haven, & Hartford Railroad* v. *Blacker*, 178 Mass. 386, which follows *Edmands* v. *Boston*, 108 Mass. 535, it was decided that damages arising from interruption of business, or from moving the contents of a building that had been cut off, or from waste in handling coal that had to be removed, though caused by the taking, were consequential in character and could not be recovered.

Nor do the cases of *Emerson* v. *Somerville*, 166 Mass. 115, 117, *Emery* v. *Boston Terminal Co.* 178 Mass. 172, and *Wil-*

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liams v. *Commonwealth*, 168 Mass. 364, 366, sustain its position. In the first case the petitioner, who formerly had been a tenant at will of land acquired by the respondent for the purpose of laying out a public park, sought to recover damages for his buildings standing on the land at the time of purchase, but it was held that by the conveyance he had become a tenant at sufferance, and the respondent had not taken his buildings. It was said in the opinion by Holmes, J., "We need not go so far as to say that no remedy is given in the case of personal property, or that there is no compensation for detriments which by the common law apart from the statute an owner of the fee would have a right to inflict. See *Lincoln* v. *Commonwealth*, 164 Mass. 368, 375; *Stanwood* v. *Malden*, 157 Mass. 17; *Woodbury* v. *Beverly*, 153 Mass. 245."

In the second case the taking was January 5, 1897, and the petition was filed May 5, 1897. The petitioners had a written lease of the premises the last extension of which expired May 1, 1897. They claimed that it had been extended for either one or two years by negotiations begun before, but completed after the taking. But it was held that the title of the petitioners and the nature and quality of their estate should be fixed as of the date of the taking, and the question now presented did not arise.

The life tenant was not allowed to prevail in *Williams* v. *Commonwealth* for improvements made by him, on the ground that the respondent had paid to the remainderman, with the assent of the petitioner, a sum representing the market value of the estate, and there was nothing to show they were not included in the taking, as until severance they were part of the real estate. There had been no severance, and the petitioner when he received his proportionate part of the damages, as between himself and the remainderman, was held to have got all that he was justly entitled to, and compensation was thus afforded for property taken.

In the petitioner's case her building was in the nature of fixed property located on the line of the street. It was directly affected by the work done, and no question of remote damages is presented by this branch of the case.

Among the rights incident to her tenancy she could have

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maintained an action for any wrongful invasion of her premises, or injury to her building while her possession continued, *Dickinson* v. *Goodspeed*, 8 Cush. 119, though at common law no action could be maintained against the respondent, who in a lawful manner, and without negligence, was engaged in carrying out a public improvement duly authorized by law. *Dodge* v. *County Commissioners*, 3 Met. 380, 383. *Purinton* v. *Somerset*, 174 Mass. 556.

The settlement made with the landowner did not include her damages, for he asserted no title to the building, which could have been removed at any time before her estate terminated, and she is not precluded from recovery on the ground that it had become a part of the realty. See *Howard* v. *Fessenden*, 14 Allen, 124, 128.

Manifestly then if the respondent's argument is to prevail there may be a very serious and substantial injury done to rights of property in the conduct of such an undertaking for which no remedy is provided.

On principle no sufficient reason appears why the owner of a building of the description, and held under the conditions disclosed by the report, and where it is agreed that substantial damages have been sustained by a change of grade in a public way on which it abuts, should not be treated as between herself and the public as possessing a sufficient interest in real estate to enable her to maintain a petition under the terms of a statute broad enough to include compensation. *Ashby* v. *Eastern Railroad*, 5 Met. 368. See also in this connection *Currier* v. *Barker*, 2 Gray, 224, 226; *McGee* v. *Salem*, 149 Mass. 238, 240.

We are of opinion that the words "all damages sustained" in the statute under consideration, when applied to a change of grade in an established public way, should be held to cover compensation for injuries caused to a building located on the line of the street, and substantially annexed to the soil, though as between the owner of the fee and the owner of the building it is a tenant's fixture which may be removed, and thus give the petitioner a remedy to recover the damages she has suffered.

The measure of recovery is determined in this case by the agreement of the parties. But ordinarily the damages to be assessed would be found in the difference between the value

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of the property as a whole before the change of grade, and its value thereafter. In such an assessment the nature of the title, and the right of the lessor to determine the tenancy, either by grant or by giving the proper statutory notice are important, as affecting the amount that should be awarded.

By the terms of the report the petitioner also asks for damages sustained by the impairment of the use of her property during the time the work was being done, because full access to the building was cut off, though it was not rendered wholly inaccessible from the street.

Any inconvenience caused to the general public and any caused to her by the change of grade whereby the street was rendered less convenient for use was the same in kind, even if because she lived in the street she may have been put to greater annoyance than was suffered by those who used it generally as travellers, and does not give to her any claim for damages from this cause.

But if during the time the work was being done access to her building was thus rendered more difficult, this was an injury special and peculiar to her use of the premises, and for which she is entitled to recover. *Woodbury* v. *Beverly*, 153 Mass. 245, 248. *Putnam* v. *Boston & Providence Railroad*, 182 Mass. 351. *Bailey* v. *Boston & Providence Railroad*, 182 Mass. 537, 540.

In accordance with the terms of the report there must be judgment for the petitioner in the sum of $434.

So ordered.

MICHAEL MURPHY & others *vs.* COMMONWEALTH.

Essex. November 1, 1904. — February 27, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Adverse Possession. Municipal Corporations. Evidence, Competency. *Real Action. Pleading, Civil. Witness*, Cross-examination. *Practice, Civil*, Exceptions.

To prove title by limitation in a town to certain land on a beach, the town may put in evidence entries on the books of the town treasurer showing the receipt of rent for the land, leases of the land made by its selectmen, and votes of the

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town authorizing the making of such leases by the selectmen and asserting the town's exclusive ownership of the land, tending, with the additional facts of occupation of the land by the lessees and payment of rent by them to the town, to show continuous and open possession of the land by the town through its lessees.

To show possession of certain land on a beach by a town under a claim of right, and also to show the authority of the selectmen of the town to deal with the land, the town may put in evidence an indenture between the town and the owner of adjoining land, adjusting a boundary of the land in question, and containing a copy of a vote of the town referring the matter of the adjustment of the boundary to the selectmen with full power to act thereon.

The plea of *nul disseisin* in a real action is an assertion of possession under title.

On the issue of the title to certain land claimed by a town under adverse possession beyond the period of limitation, if the claimant against the town has testified that he went upon the land and told the lessee of the town that he owned it and then withdrew upon being told that he must settle the matter with the town, he cannot be asked in his own behalf what his intention was in going upon the land and informing the lessee that he owned it, as his undisclosed intention cannot affect the character of his act, or make it any the more an interruption of the peaceable possession of the town.

On the issue of the title to certain land claimed by a town under adverse possession beyond the period of limitation, the town can show by cross-examination of the claimant against the town that the witness never paid any taxes on the land and that he knew of no one paying taxes upon it for him or for any of the heirs at law of the ancestor under whom he claimed, this tending to show by inference that no taxes had been assessed because the town claimed title.

For the purpose of acquiring title to land by limitation, acts of disseisin and of letting the land to a tenant done by a town under a claim of right have the same effect as similar acts done by any other corporation or by an individual. In determining whether the possession of an actual occupant is the possession of the town all the acts of the town relating to the matter are to be considered.

A town may let land for hotel purposes.

The occupation of a tenant in possession of land under a lease in writing, for the purpose of establishing adverse possession under a claim of right by his landlord, extends, if not actively interfered with, to the whole premises described in the lease if the tenant has actual physical possession of any part.

A city or town can acquire land for a purpose not public by adverse possession beyond the period of limitation.

No exception lies to the refusal of a request for a ruling founded on the assumption of a fact in dispute.

No exception lies to the refusal at the hearing of a motion for a new trial to make a ruling of law upon a question raised at the trial.

BARKER, J. This was a petition for damages for the taking of twenty-two thousand square feet of land lying on the ocean side of Nahant Neck between Nahant Road and the sea, in the general locality known as Long Beach. The taking was made by the metropolitan park commissioners on September 26, 1900. The respondent admitted the taking but denied title in the petitioners. They claimed title under Thomas B. Murphy who died

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on September 10, 1861, and proved that whatever title he had in the land was in them at the time of the taking except so far as it may have been lost through adverse possession by the town of Nahant. Their evidence tended to show that the land was part of a tract of four acres called Lindsey Marsh. The respondent contended that Daniel Fairchild who deeded to Thomas B. Murphy on September 23, 1859, was then disseised, that the land was no part of Lindsey Marsh, that Lindsey Marsh was wholly on the harbor side of the Nahant Road, and did not extend across the road and on both sides of it, that the land was part of Long Beach so called, and that it was owned by the town of Nahant.

In answer to specific questions the jury found that Murphy's grantor was not disseised when he gave his deed, that Lindsey Marsh was on both sides of the Nahant Road on Long Beach, and that the land was a part of Lindsey Marsh.

The verdict was for the respondent and the case is here upon a bill of exceptions which comprises certain exceptions taken by the petitioners at the jury trial, and an exception taken by them upon the hearing on a motion for a new trial.

Several of the exceptions were to the admission of evidence. Before examining them in detail it is well to state that the territory now Nahant was a part of Lynn until March 29, 1853, when Nahant was incorporated as a separate town by St. 1853, c. 114, the dividing line between the two municipalities being a line drawn east and west across the course of Long Beach, and running at right angles with the course of that beach from a certain sign post, which then gave the length of the beach, to low water on the ocean side, and at right angles with the course of the same beach, from the same sign post to low water on the harbor side. See St. 1853, c. 114, § 1. Long Beach was about two and one half miles long, two in Nahant and the rest in Lynn. It was undisputed that the town of Nahant owned much land on Long Beach, near to the land described in the petition and running toward Nahant several thousand feet on Nahant Road, all of the land being unenclosed and mostly vacant, and not built upon or improved by the town itself, although its selectmen had leased or rented two adjoining parts of it, one to one Soule and the other to one Massey.

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The deed of September 23, 1859, to Murphy fixes the northwest corner of the land deeded as at the central stone monument between Lynn and Nahant and describes a parcel of land lying on the easterly side of what commonly is called the Nahant Road and between that road and the ocean, eight rods wide on the westerly end and four rods on the easterly end where it touches the sea, its southerly line being twelve rods in length and its northerly line fifteen. There thus was left between this land and the division line of Lynn and Nahant a triangular piece of land about one hundred and fifty feet in width at high water mark and decreasing in width to nothing at the northwest corner of the land deeded. The deed recites that the land conveyed is "a certain parcel of marsh and beach land being part of the eastern half of the marsh and beach known by the name of 'Point Close' or Lindsey Marsh . . . said marsh being now covered by the sand of Long Beach."

The evidence tended to show that the land leased to Soule was bounded northerly by the town line, easterly by the ocean, and westerly by the Nahant Road, and that it extended so far southerly as to include all of the land to which the petitioners contend that they had title at the time of the taking and considerable other territory, and that it was bounded on the south by the land leased to Massey; that neither of these parcels was enclosed by fences, and that the general nature of the occupation of each was that of a place for seashore resort. On the Soule parcel was a building owned by the lessee called Hotel Nahant, the exact location of which was in dispute. Although the jury found that the land in question was part of Lindsey Marsh we think it plain that during the period to which the evidence was addressed it also was a part of the Long Beach.

The books of the town treasurer of Nahant, under the caption "Land rent Long Beach," show entries of the receipt of sums of money for the years 1859–1900 both inclusive, with the exception of the years 1862, 1868, 1873, 1878, 1884, 1892 and 1893. The entries down to and including 1882 tend to show that the amounts received were paid by Samuel Soule. Those from 1883 to 1891 inclusive tend to show that the payments were made by S. Soule and Son by S. N. Breed and Company, those of 1894 and 1895 that the payments were made by S. N.

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Breed and Company, and those for 1896 and thereafter the payments were made by D. L. Trafton. No entry other than the caption "Land rent Long Beach" appeared on the books to identify either the location of the premises for which rent was received from Soule or the other persons named or the quantity of land. The books were produced in court by the town treasurer, then serving his second year, who testified that the rents were received for land on which stood the Hotel Nahant and the picnic park buildings, and that there was nothing on the book to tell where the land was located other than somewhere on Long Beach. The petitioners excepted to the admission in evidence of the treasurer's book with the above mentioned entries.

Frank Soule, called by the respondent testified to the death in 1890 of his father Samuel Soule; that his father was in the hotel business, and that his hotel was located on the beach close to the Lynn line on the ocean side of the road leading to Nahant; that the hotel occupied land extending from the Lynn line about three hundred and fifty feet toward Nahant; that the land was unenclosed and the buildings did not cover the whole of it; that he was in business with his father after 1876; that the firm leased the land upon which the hotel and buildings stood; that he had attempted to find the old leases and had found one for the year 1880 and that the others had been lost; that they always hired the same land continuously from year to year and hired it from the town of Nahant, and paid rent to the town and never to anybody named Murphy or claiming under Thomas B. Murphy; that his father had told him that he began to hire the land in 1856; that his own recollection went back into the sixties, that his father was continuously in possession down to 1890, and that from the time of his own recollection down to 1890 nobody besides his father and himself was in possession of the land; that they occupied from the Lynn line about three hundred and fifty feet, and that during all the time that they were there the possession of the land was never interfered with at all by the Murphys. The same witness also testified as to the size, location, use and time of erection of different buildings on the land; that the land between the Lynn line and the buildings was occupied by walks from the roadway to the hotel, but mostly was vacant and was occupied by his father and himself

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in connection with the hotel; that the Massey land was between three hundred and fifty and four hundred feet from the Lynn line, and that he had occupied under the lease which he produced and which was dated February 28, 1880, and was for the term of five years from January 1, 1880, and also under another lease which was produced by another person, dated July 2, 1883, and which purported to be made by the town of Nahant by its selectmen to Samuel Soule and Son for the term of ten years from March 18, 1883. Each of these two leases purported to be signed by the selectmen of Nahant and by the Soules. The two leases were admitted in evidence against the objection of the petitioners, and they excepted.

Certain votes of the town of Lynn passed on March 18, 1837, and votes of the town of Nahant passed on April 16, 1853, March 12, 1859, March, 10, 1860, March, 1864, and March, 1870, were admitted in evidence against the objection of the petitioners, and they excepted. The votes of Lynn were that five persons named "serve as beach committee the ensuing year," and "that no person be allowed to take seaweed from the bay side of Long Beach, for the year ensuing." The Nahant vote of April 16, 1853, seems to have been passed at the first meeting after the incorporation of the town on March 29, 1853, and was "That the selectmen be empowered and directed to take all legal measures for the preservation of Long and Short Beaches." The Nahant votes of March 12, 1859, are longer. The first begins with a recital that "Whereas the ownership and fee of the beaches, shore and strand surrounding the town . . . are claimed as the property of the town, and whereas, divers persons owning land abutting on said beaches, shore and strand, and others, have obstructed the access thereto, by erecting fences or buildings thereon, or otherwise . . . and by continuing such obstructions may possibly acquire rights adverse to those of the town, and of the public, Voted, That the town claims to be the owner in fee of all the said beaches, shore, and strand . . . subject always to the public rights of navigation, fishing, fowling, and bathing thereon, in such manner as may not be inconsistent with the laws, and police regulations, of the Commonwealth, and this town."

The second, so far as it relates to beaches, is this: "Voted,

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That the town disputes and denies the right of any person or persons to the exclusive use of the said beaches, shore, or strand, . . . and also the right of any person or persons to exclude the public therefrom, or from the use and enjoyment thereof for the purposes aforesaid; excepting those places in which the town, or the selectmen thereof, have granted, or may hereafter grant, such exclusive rights."

The third vote, so far as it relates to the beaches, is this: "Voted, That notice of the intent of the town to maintain its legal rights as aforesaid, be given by serving the owners of all lands abutting on said beaches, shore, or strand . . . by serving them individually with copies of these votes, in the manner prescribed in the 28th section of chapter 60, of the Revised Statutes, and by having them recorded in the Registry of Deeds." The section referred to in the third vote is one providing a method by which the owner of land may prevent the acquiring of certain rights therein. See Rev. Sts. c. 60, §§ 27, 28.

The vote of Nahant passed on March 10, 1860, is this: "Voted, That the selectmen be authorized to tear down any fence, remove any building, fill up any well, etc. which may be built or dug on Long Beach."

That of March, 1864, is as follows: "Voted, That the selectmen be instructed to post at the further end of the beach a notice of the act forbidding all persons to remove seaweed, sand, etc. from the beach, and that the constables prosecute all violations of the existing law that may come to their notice."

In connection with this vote we notice the fact that the removal of "any stones, gravel, or sand, from the Long Beach in the town of Lynn," was forbidden under a penalty, one half of which was to be for the use of the town of Lynn, by St. 1848, c. 200. Also that by St. 1852, c. 214, it was provided that no person should carry away "any seaweed from the Long Beach, in the city of Lynn, without permission first obtained from the city council of said city, or from some person or persons duly authorized by the said city council to grant such permission," and that one half of the penalty for offending against the provision should be for the use of the city of Lynn. Also that by St. 1854, c. 294, it is provided that no person shall remove "any seaweed, sand, stones, gravel or mud, from either of the

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beaches called Long Beach or Little Beach, in the town of Nahant, without permission first obtained from the selectmen of said town of Nahant, or from some person or persons duly authorized, by the selectmen of said town, to grant such permission," and that one half of the penalty for any violation of the prohibition shall be "for the use of said town of Nahant."

The Nahant vote of March, 1870, is this: "On Article 7 in the warrant — to see if the town will authorize the selectmen to lease the beaches and town lands — Voted: That the selectmen be authorized to lease as much of the public lands, including Long and Short beaches, as may in their judgment be for the interests of the town."

We think that the entries in the town treasurer's books, the leases and the votes stated were all properly admitted in evidence. They tended to show that from its first incorporation in 1853 the town had claimed the fee of the land in dispute, as a part of Long Beach, and that from 1859 the town continuously had leased the land through the agency of its selectmen, and had received the stipulated rent in most of the years from 1859, and that the town denied ownership in any other person and had continuously maintained an open possession of it through its lessees.

The title of towns in this Commonwealth to lands bordering upon the sea has not unfrequently been before our courts for adjudication. In *Boston* v. *Richardson*, 105 Mass. 351, ancient orders of the selectmen of Boston giving liberty to set up a fish house or to occupy a fish stall taken in connection with the evidence of the subsequent occupation of the premises for the purpose mentioned in them were held admissible upon the question whether the city of Boston held title to certain flats. Here although neither of the two leases was an ancient document, yet taken in connection with the facts that the lessees occupied under them and in fact paid rent to the town, the leases tended to show actual possession by the town through its lessees under a claim of title in fee.

The vote of Lynn in 1837 forbidding the taking of seaweed from the bay side of Long Beach was before the enactment of the Legislature upon that subject, and when St. 1848, c. 200, and St. 1852, c. 214, were passed, the town of Lynn was to have

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an interest in all penalties. These circumstances point clearly enough to a claim of ownership on the part of the town of Lynn, of which Nahant is the successor, to make them admissible in evidence upon the question of the attitude of Nahant as a town toward the Long Beach which was in dispute at the trial. It has been said that the extent of the authority of selectmen as special agents of their town "may indeed depend largely upon long continued usage and custom." Colt, J., in *Clark* v. *Russell*, 116 Mass. 455, 457. We think all of the evidence which we have stated tended to show that the town of Nahant continuously has claimed title to Long Beach, and that its selectmen have been its special agents in dealing with the beach, that the Soules were occupying under the town and with an open claim of ownership in the town adverse to all others, and so that all the evidence stated was admissible.

An indenture made on July 20, 1874, between the town of Nahant and John P. Woodbury was admitted in evidence against the objection of the petitioners, and they excepted. This instrument recited that a dispute had arisen between the parties to it as to the boundary between their lands and that they had agreed upon a division line which was described; that the town granted and released to Woodbury all the land west of that line and that he forever quitclaimed to the town all the land east of the line. The division line began in the town line between Lynn and Nahant and ran southerly over seven hundred feet, and the land which Woodbury thus released to the town included the land in question. Upon this indenture was a copy of a vote of the town of Nahant passed March 14, 1874, by which, upon an article in the warrant "To see if the town will quitclaim certain land on Long Beach to J. P. Woodbury," the town "Voted, that the matter be referred to the selectmen with full power to act thereon."

We think the indenture was properly admissible as tending to throw light upon the issue whether the town stood towards the land in the attitude of one claiming title, and also upon the question of the authority of the selectmen under usage and custom to act for the town in its dealings with Long Beach.

The petitioners offered in evidence the record of a suit upon a writ of entry brought by Woodbury against the town of Nahant

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in the year 1871, to try title to four acres of land. In the suit Woodbury had disclaimed title to the land now in question, and the town of Nahant pleaded *nul disseisin* as to the whole four acres. The record was offered as tending to show that at the time of the indenture the town of Nahant had no title to the land and that the petitioners had title, and as tending to show that the town had not up to that time made any adverse claim to the land and was not in adverse possession. The record was excluded and the petitioners excepted. But the plea of *nul disseisin* was an assertion that the town was in possession under title. *Higbee* v. *Rice*, 5 Mass. 344, 352. *Burridge* v. *Fogg*, 8 Cush. 183. *Tappan* v. *Boston Water Power Co.* 157 Mass. 24, 31.

The record disclosed as we understand the statement of it in the bill of exceptions only the writ and pleadings in the suit. So far as it disclosed assertions or admissions of Woodbury they were as to the petitioners *res inter alios*, and immaterial. So far as the record disclosed pleadings on the part of the town there was nothing to show that even if responsible for them they had any tendency either to prove title in the petitioners or lack of title or possession in the town. This exception must be overruled.

Michael Murphy, one of the petitioners, testified that in the year 1883, when the Hotel Nahant was being enlarged, and he discovered that it was being built over on the land claimed by the petitioners, he went upon the land and saw Samuel Soule and showed him the deed of September 23, 1859, from Fairchild to Thomas B. Murphy, and told Soule that the building was partly on his (Murphy's) land, to which Soule replied that he must settle that matter with the town of Nahant, as he had a lease. Murphy was then asked, "When you went upon the land and found what was there and when you went to Mr. Soule and showed him your deed and informed him that he was over upon your land, what was your intention?" He was also asked, "What was your intention going upon the land at that time?" Both of these questions were excluded and the petitioners excepted to the exclusion.

We infer from the statement of the bill of exceptions that these questions were asked for the purpose of showing that the witness went upon the land for the purpose of regaining possession

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as against the claim of the town of Nahant or any other party, that the answer of the witness would have been that his intention in going upon the land was to regain possession of it. The bill does not state what the answer of the witness would have been, nor that any disclosure of the purpose of the questions was at the time made to the court. However this may have been we think the questions were rightly excluded. The secret and undisclosed intention of the witness was immaterial. Whether his entry constituted an interruption of the peaceable possession of the town, could not depend upon the secret intention of the witness, but did depend upon whether his entry bore upon its face an intention to resume possession. See *Altemas* v. *Campbell*, 9 Watts, 28, 30, 31; *New Shoreham* v. *Ball*, 14 R. I. 566, 571. He exercised no act of dominion, but merely went upon the land and told the tenant that he owned it, and withdrew upon being told that he must settle the matter with the town. His undisclosed intention was immaterial.

The petitioner Murphy upon cross-examination testified against the objection and exception of the petitioners that he had never paid any taxes on the land, and that he knew of no one paying taxes upon it for him, or for any of the heirs of Thomas B. Murphy. We think that this testimony by inference tended to show, that the town claiming title no taxes had been assessed, sufficiently to make it admissible upon cross-examination of one of the petitioners.

The remaining exceptions relate to requests for instructions to the jury and to the request made to the judge for a ruling of law upon the hearing of the petitioners' motion for a new trial. Before the charge the petitioners requested the judge to give thirteen numbered instructions, and after the charge specified that they excepted to the refusal to give all of them except those numbered 1 and 2. At the close of the charge they requested the judge to rule that "the possession of the petitioners under their deed is presumed and follows the legal title unless the contrary is shown", and they then excepted to the refusal to give this ruling.

The thirteen requests were as follows:

1. The town of Nahant could not acquire any right in the land of the petitioners under any act of the selectmen, even

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though made under a claim of right in the town, without a corporate vote.

2. The selectmen of the town would have no right to make a lease of the land of the town to any person without the corporate vote of the town, and any lease so made would be void.

3. If the jury should find that the selectmen made a lease of the petitioners' land under a vote of the town, authorizing them "to lease the lands of the town" or "land of the town on Long Beach" such lease would be void as against the petitioners, even though in so doing the selectmen thought the land so leased belonged to the town. And no possession of such land, however long continued, and even though rent was paid to the town by Soule or any other party in possession of the premises under such lease could give to the town any right of property in the premises, as against the petitioners, they being the true owners of the land.

4. The town of Nahant, to acquire any right in the petitioners' land, adverse to their legal title, must act by corporate vote; and such vote must show the clear intention of the town to claim the land of the petitioners as its own under a claim of right. That such a vote in itself would not give to the town any right or ownership in the land of the petitioners, unless possession was taken of the land by the town, and such possession by the town was held and continued uninterrupted and adverse to the petitioners for the full period of twenty years from the date of taking possession. And the burden is on the respondent to show the date when such possession was taken by the town and its continuance during the entire period. That any break in the possession of its continuance during the period would stop the running of the statute against the petitioners, and the period of twenty years would begin from the date of the last possession taken and shown.

5. That a lease of the respondent's land given by the selectmen is not possession of the land or any evidence of possession to sustain an adverse claim in the town.

6. That the respondent is bound to show the authority in selectmen of the town to make the lease of the petitioners' land, and this can only be done by proving the same by the records, showing the corporate vote.

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7. That the inhabitants of the town or its officers claiming by right of the town entering upon and occupying the land of the petitioners are not agents or representatives of the town by whose acts the town could acquire rights or ownership in the petitioners' land without action by the town itself.

8. That the entries in the treasurer's book of the town of Nahant, showing payment of rent to the town "for land on Long Beach" by Soule, is not evidence of any claim of right by the town to the petitioners' land nor of any possession by the town of their land, or that the town knew it was receiving rent for their land or any portion of it, or that the town had any knowledge that the party paying the rent was occupying the petitioners' land.

9. That the possession by Soule of the petitioners' land was not the possession of the town, and the town could acquire no right adverse to the petitioners by any such possession.

10. That the town of Nahant had no authority under the law to make leases or to let to Soule for hotel purposes any part of Long Beach, giving him the exclusive use of said land as against the public rights. And such leases and letting was void, and any possession of the petitioners' land by Soule under such leases or letting would not be possession by the town so as to give to it any rights against the petitioners.

11. The party claiming adverse possession must show the part actually in possession and its exact measurements.

12. Adverse possession of part is not adverse possession of the whole.

13. A town cannot acquire land by adverse possession for any purpose except public purposes.

In dealing with this branch of the case, and premising that the jury was instructed that the burden was upon the respondent of proving that the petitioners could not recover because any title in them had been lost by adverse possession, it is to be borne in mind that that defence would be established by proof that the petitioners had been disseised and continuously kept out of possession for the legal term by a person or a succession of persons occupying the land continuously for that term, openly and adversely to the petitioners and under a claim of title adverse to them. *Harrison* v. *Dolan*, 172 Mass. 395. *Frost* v. *Courtis*, 172

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Mass. 401. *Wishart* v. *McKnight*, 178 Mass. 356. *Jordan* v. *Riley*, 178 Mass. 524. Still there could be no doubt under the circumstances, shown by the votes and other records, that the town had acquired title through the possession of those who occupied the land under leases in which the town purported to be the lessor if the possession of the lessees had been so open, adverse and continuous for twenty years as to bar the title of the petitioners.

The theory of the requests numbered from three to ten inclusive seems to be that a town has no capacity to work a disseisin or to put a tenant in possession of land of which it has disseised the owner; that if a town should be held to have that capacity it can be exercised only by a direct and explicit vote of the inhabitants, and that as matter of law the evidence would not justify a finding that Soule's possession of the land from 1856 to 1890, and the possession of the other tenants from Soule's death in 1890, could be the possession of the town.

As to the first part of this theory we think that acts of disseisin and of the letting of land done by a town in connection with land the title to which it claims must have the same effect as similar acts done by any other corporation or by an individual. As to the second, all the acts of the town are to be considered in determining whether the possession of an actual occupant is the possession of the municipality. As to the third the evidence, particularly that of the witness Soule, tended to show that from the year 1856 until the year 1890 his father and himself had been in open, uninterrupted and exclusive possession of the land claiming as lessees of the town continuously during all that time and paying rent to the town during all that time, and that the town in leasing the land and in receiving the rent was so doing under a claim of title to the Long Beach, and that from the death of the elder Soule in 1890 to the bringing of the petition a similar condition had continued under other occupants. Therefore none of these requests could have been given in terms. The fourth request contained clauses relating to the burden of proof and as to continuity of possession, which were in effect given in the charge, which also instructed the jury that the selectmen were not agents of the town by virtue of their office simply, but that the votes of the town were evidence of authority.

The charge perhaps might have been more full upon the law

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of prescription, but all the essential things were stated to the jury, who were told that the adverse occupation must be open, adverse, under a claim of right and continued without opposition for twenty years.

The tenth request proceeds also upon the theory that a lease of the beach for hotel purposes could not be made by the town. But we think that a town may lease for any legitimate purpose land of which it is seised.

The eleventh and twelfth requests are treated together by the petitioners, upon the theory that the possession of the Soules was not under color of title, and that therefore possession of such part of the land as was covered by building would not warrant a finding that land not actually in the physical occupation of the lessees was in their possession. But the lessees being in under written leases were occupying under color of that title to the occupation, and their possession if not actively interfered with would be coextensive with the premises leased if they had actual physical possession of any part.

The thirteenth request was properly refused for reasons already stated. Besides this, municipalities are not restricted as to the ownership of land to holding it for public purposes, and are no more restricted in acquiring title by prescription than in obtaining it by other methods.

The request presented after the charge was refused properly.* At that time the question whether the deed under which the petitioners claimed was void because the grantor was disseised when it was given was in dispute before the jury. If for this reason it had no operation there could be no presumption of possession under it.

The request for a ruling of law upon the petitioners' motion for a new trial was not addressed to any question not raised at the trial, and the exception to its refusal must be overruled. *Lowell Gas Light Co.* v. *Bean*, 1 Allen, 274.

Exceptions overruled.

J. M. Raymond, (*P. A. Kiely* with him,) for the petitioners.

R. G. Dodge, Assistant Attorney General, for the Commonwealth.

* The ruling requested was as follows: "The possession of the petitioners under their deed is presumed and follows the legal title unless the contrary is shown."

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MICHAEL L. BRENNAN, administrator, *vs.* STANDARD OIL COMPANY OF NEW YORK.

Essex. November 1, 1904. — February 27, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Pleading, Civil. Negligence, Gross.

A count by an administrator for causing the death of the plaintiff's intestate, a child, brought under R. L. c. 171, § 2, for the benefit of the next of kin of the deceased, cannot be joined with a count at common law for conscious suffering of the intestate before his death brought as legal representative of his estate.

The gross negligence of an agent or servant causing the death of a person, which is necessary to make the principal or master liable under R. L. c. 171, § 2, is a degree of negligence materially greater than the mere lack of ordinary care.

In an action under R. L. c. 171, § 2, for causing the death of the plaintiff's intestate, a boy less than five years of age, it is no evidence of gross negligence on the part of the driver of a heavy wagon drawn by three horses abreast, that he drove at a trot down a slight grade on the right hand side of a street fifty feet wide including the sidewalks, when forty feet ahead the plaintiff's intestate was standing on or near the sidewalk with his back to the street and there was nothing to indicate that he would suddenly back or turn and go in front of the horses.

TORT under St. 1898, c. 565, (R. L. c. 171, § 2,) for causing the death of the plaintiff's intestate, a boy four years and eight months old, with a second count at common law for conscious suffering of the intestate, as stated in the first paragraph of the opinion. Writ dated June 12, 1901.

In the Superior Court the case was tried before *Sherman*, J. The judge denied a motion of the defendant that the plaintiff should be required to elect upon which count he would rely. At the close of the evidence the defendant asked the judge to make the following rulings: 1. On all the evidence the plaintiff is not entitled to recover under the first count. 2. There is no evidence of gross negligence of any agent or servant of the corporation within the meaning of the statute on which the first count depends. 3. There is no evidence that the plaintiff's intestate was in the exercise of due care. 4. There is no evidence of due care on the part of the parents of the plaintiff's intestate. 5. The parents were negligent in permitting the child to be upon the street unattended at the time and under the circum-

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stances shown by the evidence, or if not so negligent because of the child's intelligence and experience the boy was himself negligent and failed to comply with the standard of boys of his age who are ordinarily careful and therefore the plaintiff cannot recover. 6. On all the evidence the plaintiff is not entitled to recover under the second count. 7. The plaintiff has shown no negligence on the part of the defendant or its agents and cannot, therefore, recover on the second count.

The judge refused to make any of the rulings requested, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $5,500, of which $5,000 was assessed under the first count and $500 under the second count. At the request of the defendant the judge reported the case for determination by this court. If the verdict could stand upon both counts, it was to stand. If it could stand only on one count, the plaintiff having signified his election to have it stand on the first, it was to stand on that count. If the verdict could not stand on either count, it was to be set aside, or such order was to be made as law and justice required.

W. A. Munroe, (*A. M. Chandler* with him,) for the defendant.

P. J. McCusker, for the plaintiff.

KNOWLTON, C. J. The first count is founded upon an alleged statutory liability for causing the death of the plaintiff's intestate, which the plaintiff seeks to enforce as the representative of the next of kin, for whom he would hold the proceeds. The second count is upon the liability at common law, for injuries to the intestate, for which he had a right of action during his life, and the claim is made by the plaintiff as legal representative of the estate of the deceased, for which he would hold the proceeds. In the first the plaintiff acts only as trustee for the next of kin, in the second only as trustee for those interested in the estate. These claims do not accrue to him in the same capacity, and hence by the rules of pleading at common law, which in this respect have not been changed by our statutes, they cannot be joined in the same action. Gould, Pl. c. 4, § 93, and cases cited. *Cincinnati, Hamilton & Dayton Railroad* v. *Chester*, 57 Ind. 297. See also *Ranney* v. *St. Johnsbury & Lake Champlain Railroad*, 64 Vt. 277, where this principle was recognized but not applied. The verdict therefore cannot stand on both counts.

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If it can stand upon only one count, the plaintiff has elected to rely upon the first. This makes it necessary to inquire whether the evidence warranted the verdict upon that count. Since the deceased was a child only four years and eight months old, it was incumbent on the plaintiff to show that there was no contributory negligence on the part of the deceased or of those who had charge of him. Although the question is not free from difficulty, we will assume in favor of the plaintiff, without deciding, that the evidence would entitle him to go to the jury on this part of the case.

To maintain the action for the death of the plaintiff's intestate, it must be shown that the accident was caused by the gross negligence of the defendant's servant, the driver of the team. The statute upon which the plaintiff relies, recognizes or creates a distinction between ordinary negligence and gross negligence. Death caused by the personal negligence of a defendant, without fault of the deceased person, creates a liability. But for a death caused by the negligence of the defendant's servants there is no liability unless the negligence is gross. The degree of difference between negligence and gross negligence, under this statute, cannot be stated with mathematical accuracy. But gross negligence is a materially greater degree of negligence than the mere lack of ordinary care. The statute compels us to recognize this distinction in the trial of cases like that now before us.

The plaintiff's intestate was run over and fatally injured on Bridge Street in Salem, which is a way that leads from Salem to the adjacent city of Beverly. It is fifty feet wide, including the sidewalks, each of which is from six feet to six and one half feet wide. The gutters are paved and are five and one half feet wide from the curbstone. We may infer that the street is paved or macadamized, and smooth and hard between the gutters. At a point about two hundred and sixty or two hundred and seventy feet from the place of the accident, there is a grade of four feet in one hundred, and this diminishes to two feet in one hundred near the place of the accident. The defendant's driver, at about half past five o'clock in the afternoon of May 4, 1901, was driving down this slight descent, on the right hand side of the middle of the street, a team consisting of a heavy tank wagon drawn

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by three horses, harnessed, as we understand, all abreast, and weighing from fourteen hundred to sixteen hundred pounds each. According to the testimony of all the witnesses, the plaintiff's intestate was standing on or near the sidewalk as the team approached, and went out in front of the team, immediately before the accident. The driver testified, without contradiction, that there was a driveway across the sidewalk at that point. The first of the plaintiff's witnesses who saw the accident said that he first saw the boy when the team was about forty feet from the boy, and that "he was backing out from the sidewalk into the gutter." The next witness for the plaintiff said that, when he first saw him, he "stood opposite the gutter, about three or four feet from the curbstone." This was just before the accident, and the boy stood with his back towards the witness, who was on the opposite side of the street. The witness did not see the accident itself, but heard the noise, the wagon shut off his view, he then saw the child lying in the street, and a man jumped off from the tank wagon and picked him up. These were the only witnesses, called by the plaintiff, who saw the boy immediately before the accident. One Casperson, called by the defendant, testified that he saw "the boy jump right before the horses," and the horses ran over him. He said the driver stopped the horses very quickly, and took the child in his arms and carried him to his father. The driver testified that he was driving about four miles an hour, with his foot on the brake, when he saw the boy standing about twenty feet ahead of the horses, with his back towards the street; that when he got within ten feet of him, the boy started backwards, and he "hollered", put on the brake hard with his foot, pulled back on the reins and swung his horses to the left, and that the boy disappeared from his view. He said that the movement of the boy backward was a quick motion, and that if he had not started back the nearest of the three horses would have passed three or four or five feet away from him. Another witness, a boy nine years of age, said that the plaintiff's intestate was turning sideways and walking across the street "kind of fast," when he was struck. He said the driver "hollered and pulled his horses in and put the brake on."

A helper who was on the team at the time of the accident

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testified that it was going at a speed of not more than four miles an hour, and that he first saw the boy about twenty feet ahead of the horses, standing in the gutter with his face toward the sidewalk, and that as they "got down to him [he] turned around and started to go across the street and he ran into the horse." He said that the driver "put his foot heavier on to the brake and pulled the horses into the breeching." These were all the witnesses who saw the accident. There was no contradiction as to the conduct of the driver after the time when the boy began to back into the street. There was testimony by one witness, called by the plaintiff, that the driver started his horses into a trot when he began to go down the grade. One witness testified that the team was going fast at the time of the accident, and another that it was going very fast. But one of these witnesses testified that the boy was backing "from the sidewalk into the gutter," about forty feet in front of the team when he first saw him, and that the team had passed about twenty or thirty feet beyond him when it was stopped. The other estimated the distance that the team had passed beyond the boy when it was stopped, at thirty or forty feet. One other witness estimated this distance at thirty feet, and several others gave estimates varying from five to twenty feet. Another witness said that the horses were going at a moderate speed, not fast. The above was the only testimony tending to show that the team was going fast.

The only testimony indicating that the driver was not exercising a high degree of care is that in regard to the speed of the team. This comes from the two witnesses already referred to; but their general indefinite testimony that he was driving fast must be interpreted in connection with their specific statements as to the distance within which this large and heavy team, going upon a smooth hard road, came to a stop. It is manifestly impossible that the team could have been brought to a dead stop within the distance stated, if it had been going very fast. The admitted facts cannot be ignored, even though we leave out of consideration the other evidence relied on by the defendant. Unless it is to be held that a team of this kind shall not be permitted to go faster than at a walk in such a street, there is little in this case to show a want of care on the part of the driver.

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According to the testimony of all the witnesses, the plaintiff's intestate was standing with his back to the street, well out of the team's line of travel, and the driver had no reason to anticipate that he would suddenly back or turn so as to come into his course.

The burden was on the plaintiff to establish the proposition that the driver was not only negligent, but grossly negligent. The distinction between these degrees of negligence is established by the statute, and we are of opinion that there was no evidence to warrant a verdict for the plaintiff.

Verdict set aside.

ALBERT H. FARNUM & others *vs.* FRANK H. WHITMAN.

Suffolk. March 4, 1904. — February 28, 1905.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Wagering Contracts. Contract, Validity, Performance and breach. *Evidence*, Competency. *Witness*, Cross-examination.

To prove that a contract is void at common law as a wagering contract it is necessary to show that both parties expressly or impliedly understood and agreed to the things which made the contract a wager.

An unexpressed intention of a party to a contract not communicated to the other party in no way can bind or prejudice the party ignorant of it.

In an action for a balance alleged to be due on purchases of wheat made by the plaintiff on orders from the defendant, in which the defence was that the transaction was a wagering contract, the plaintiff testified that he purchased the wheat in Chicago through his agent and tendered to the defendant warehouse receipts representing the wheat which the defendant refused to receive, and further testified that he was a member of the Chicago board of trade at the time of the transaction. He then against the defendant's objection was permitted to testify that in the Chicago board of trade deliveries of wheat were made by means of warehouse receipts and that the grain represented by them remained in the warehouse until delivered for shipment. No question was made that the receipts were sufficient evidence of the ownership of the number of bushels of wheat which they purported to represent. *Held*, that the evidence as to the method of delivery of wheat in the Chicago board of trade was competent on the question of the plaintiff's readiness and willingness to perform the contract, and was not made incompetent by the admission that the receipts were sufficient evidence of ownership.

In an action for a balance alleged to be due on purchases of wheat made by the plaintiff on orders from the defendant, in which the defence is that the trans-

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action was a wagering contract, the plaintiff may be allowed to testify, in rebuttal of testimony of the defendant, that there was no agreement between the plaintiff and the defendant that the contract should be settled by the payment of differences.

In the cross-examination of a party to an action, if he has been asked whether he did not make certain statements in his testimony in another action brought against him, and if the cross-examining counsel has read to the witness statements made by him at the trial of the other action and has stated that he is reading from an official stenographic report, the presiding judge may refuse to allow the counsel to state what the report is or the name of the case in which it was made, and may refuse to allow him to ask the witness whether the facts in the two cases are not identical, it being immaterial in what case the statements were made or whether the cases are identical, if the jury understand that the statements were made under oath and related to an issue involved in the case on trial.

CONTRACT for a balance alleged to be due on purchases of wheat made by the plaintiffs on orders from the defendant on January 4 and January 7, 1884. Writ dated September 23, 1884.

At the trial in the Superior Court in October, 1903, before *Hitchcock*, J., the jury returned a verdict for the plaintiffs in the sum of $456.99 with $522.93 of interest, making $979.92. The defendant alleged exceptions, raising the questions stated by the court.

R. L. Raymond, for the defendant.

G. F. Ordway, for the plaintiffs.

MORTON, J. This is an action of contract to recover the loss alleged to have been sustained by the plaintiffs in purchasing for the defendant pursuant to his orders given in January, 1884, two lots of May wheat of five thousand bushels each. The defence is that the contracts were wagering contracts. The plaintiffs had a verdict and the case is here on exceptions by the defendant to the admission and exclusion of evidence.

1. The defendant offered to show that at the time of entering into the transactions he had no intention of receiving the wheat. He did not offer to show that this was known to the plaintiffs. The evidence was rightly excluded. The transactions were before St. 1890, c. 437, and that statute is not, therefore, applicable, and the question must be determined by the rules of the common law. At common law, in order to render a contract void as a wagering contract, it must appear that both parties understood and agreed, expressly or impliedly, to the things

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which constituted it as matter of law a wagering contract. This does not rest on grounds peculiar to wagering contracts. The unexpressed or uncommunicated intention of one party to a contract is not binding upon the other party to the contract. In order to be binding the intention must be common to both. See *Marks* v. *Metropolitan Stock Exchange*, 181 Mass. 251; *Allen* v. *Fuller*, 182 Mass. 202; *Harvey* v. *Merrill*, 150 Mass. 1; *Brogden* v. *Metropolitan Railway*, 2 App. Cas. 666, 691, per Lord Blackburn; *White* v. *Corlies*, 46 N. Y. 467.

2. The plaintiff Reardon testified that the defendant's orders were forwarded to Baldwin and Company in Chicago, who were the plaintiffs' correspondents, and that in May the plaintiffs bought ten thousand bushels of wheat through Baldwin and Company, who forwarded to them warehouse receipts for the same, and that the plaintiffs tendered these receipts to the defendant who declined to accept them. No question was made that the receipts were sufficient evidence of the ownership of the number of bushels of wheat which they purported to represent. The plaintiff Reardon testified without objection that he was a member of the Chicago board of trade at the time of the transactions in question, and, subject to the defendant's exceptions, was permitted to testify to the method in the Chicago board of trade of making deliveries in the purchase and sale of wheat and other merchandise, and that such deliveries were made by means of warehouse receipts or certificates which were negotiable in form, and that the grain represented by them remained in the warehouse till delivered for shipment. We think that the evidence was admissible. The defendant's case was that the contract was a wagering contract. The plaintiffs' case was that it was a contract for the sale and delivery of ten thousand bushels of wheat in Chicago in May, and the evidence was competent on the question of their readiness and ability to perform. *Salter* v. *Woollams*, 2 M. & G. 650. Benjamin, Sales, § 679. The statement in the exceptions that no question was made that the warehouse receipts were sufficient evidence of the ownership of the wheat which they purported to represent did not render the evidence incompetent.

3. The plaintiff Reardon was further allowed to testify in rebuttal subject to the defendant's exception that there was no

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agreement between the plaintiffs and the defendant that the contract should be settled by the payment of differences. The testimony related directly to the substance of the issue on trial and was clearly competent.

4. It appeared that an action had been brought against the plaintiffs by one Wakefield, and the defendant in the cross-examination of Reardon offered to show that the defence in that case was, that the contract was a wagering contract, that the facts in that case were identical with those in the case on trial, and that Reardon testified in that case that it had been the custom of his office for fourteen years, which would cover the dates of the transactions in the present case, to make none but wagering contracts. The testimony was excluded, but the defendant was allowed to ask Reardon if he had not made certain statements corresponding to those to which the offer related, and in so doing to read to him statements made by him at the trial in that case, and to state that he was reading from an official stenographic report. He was not allowed to state what the report was, nor whether it was a report in the case of *Wakefield* v. *Farnum*, 170 Mass. 422, and the testimony of Reardon did not indicate in any way the occasion on which it was given. Whether the statements were made in the trial of the case of *Wakefield* v. *Farnum* or not, or whether the facts of that case were identical with those in the case on trial, was irrelevant and immaterial. It is plain we think that the jury must have understood that the statements were made under oath in a judicial proceeding where one of the questions involved related to wagering contracts. That was as far, we think, as the defendant had a right to go into the circumstances under which the statements were made.

Exceptions overruled.

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WEBB GRANITE AND CONSTRUCTION COMPANY *vs.* CITY OF WORCESTER.

Worcester. October 5, 1904. — February 28, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

Municipal Corporations. Way. Worcester. Contract, Performance and breach.

Whether an appropriation made by a city for "construction of streets" includes payment for land acquired by right of eminent domain over which the streets are laid out, *quære*.

Under the provision of the revised charter of the city of Worcester, St. 1893, c. 444, § 29, that "No sum appropriated for a specific purpose shall be expended for any other purpose, and no expenditure shall be made and no liability incurred by or on behalf of the city until the city council has duly voted an appropriation sufficient to meet such expenditure or liability, together with all prior unpaid liabilities which are payable therefrom," land damages awarded under a lay out of new streets for land of which possession has not been taken, although notice has been given of the time within which buildings must be removed, are not "unpaid liabilities" payable from the appropriation on hand which must be covered before new expenditures can be authorized.

Under the revised charter of the city of Worcester, St. 1893, c. 444, § 40, the street commissioner has general authority in the management of his department to make contracts not to exceed a certain amount and above that amount can make such contracts when approved by the mayor. Therefore, after the passage of an order by the city council requiring the street commissioner under the direction of the mayor to construct a three arch masonry bridge at the causeway crossing Lake Quinsigamond, and after the necessary appropriation has been made, the street commissioner in conjunction with the mayor has power to make a contract for the construction of the bridge.

Where a vote of a city council ordering the construction of a certain bridge by the street commissioner under the direction of the mayor contains a statement of the estimated cost of the bridge, the amount named is to be treated as a mere expression of opinion and not as imposing a limit which cannot be exceeded in a contract for the construction of the bridge, and the street commissioner and the mayor using their discretionary power for the benefit of the city may accept a bid for the work somewhat in excess of the estimated cost.

It is no defence to an action by a contractor against a city for refusing to proceed with the work contracted for, that the plaintiff did not complete the work within the time fixed by the contract, if the sole cause of the plaintiff's delay was an injunction, served on both parties to the contract in a suit in equity brought by ten taxable inhabitants under Pub. Sts. c. 27, § 129, (R. L. c. 25, § 100,) to restrain the expenditure called for by the contract, and subsequently dissolved.

CONTRACT on a contract in writing dated July 30, 1897, for the building by the plaintiff for the defendant of a stone bridge

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in substitution for a part of the causeway crossing Lake Quinsigamond. Writ dated August 24, 1898.

In the Superior Court the case was heard by *Fessenden*, J., without a jury. He found for the plaintiff in the sum of $10,289.98; and the defendant alleged exceptions.

The order of the city council of the defendant passed on May 24, 1897, described in the first paragraph of the opinion, was in full as follows:

"Ordered: — That the street commissioner be and he is hereby authorized and directed under the direction of the mayor, and under the immediate direction of the city engineer, to construct at the causeway crossing at Lake Quinsigamond, a three arch masonry bridge, in accordance with plans on file in the office of the city engineer.

"Estimated expense, $62,658.27.

"The cost of construction to be charged to street construction account."

A. P. Rugg, for the defendant.

R. Hoar, for the plaintiff.

BRALEY, J. The contract between the parties rests on an order of the city council passed May 24, 1897, that required the street commissioner, under the direction of the mayor, to construct "a three arch masonry bridge" at the causeway crossing Lake Quinsigamond, "the cost of construction to be charged to street construction account."

In the litigation which took place over this order, two suits were brought to test its validity. It was decided in one, that as the order was for specific repairs of a public way, which the city council had authority to make, a petition for a writ of certiorari to quash the record should be denied; and in the other, that a bill in equity brought by ten taxable inhabitants of the defendant under Pub. Sts. c. 27, § 129, after the contract had been signed, to restrain the expenditure of money thereunder, and in which the plaintiff was joined as a party defendant, should be dismissed. *Bigelow* v. *City Council of Worcester*, 169 Mass. 390. See also St. 1893, c. 444, § 20, which is the revised charter of the defendant, and *Worcester* v. *County Commissioners*, 167 Mass. 565.

Although the order must be treated as valid, the defendant now contends that on July 30, 1897, when the contract was

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executed, there was no sufficient appropriation available from which the cost of the bridge could properly be paid. If this is proved, then the city was prohibited from incurring this liability, as the revised charter provides that "No sum appropriated for a specific purpose shall be expended for any other purpose, and no expenditure shall be made and no liability incurred by or on behalf of the city until the city council has duly voted an appropriation sufficient to meet such expenditure or liability, together with all prior unpaid liabilities which are payable therefrom." St. 1893, c. 444, § 29.

That the plaintiff was required to take notice of this statutory limitation may be conceded, yet the defendant's authority to bind itself was limited only by conditions that depended upon previous lawful municipal action.

The specific appropriation provided by the order of June 1, 1897, "for the construction of streets and bridges" was more than sufficient to pay for the bridge and construction of streets previously ordered, unless damages awarded for lands taken in the laying out of these streets are to be deducted.

All the decrees taking the land, awarding damages therefor and establishing the lay out, were in the usual form, and it was within the power of the city council to have made an appropriation from which damages should be paid when the lands were entered upon and possession taken for purposes of construction. Pub. Sts. c. 49, §§ 14, 69, 91. St. 1892, c. 415, § 4. St. 1893, c. 444, § 20. See *Harding* v. *Medway*, 10 Met. 465.

No money, however, was appropriated by any separate order.

Assuming without deciding that if damages are to be paid from this account it must be for the reason that the general words "construction of streets" include payment for land acquired by right of eminent domain over which they are laid out, this defence is not sufficient to enable the defendant to avoid the contract. In order to sustain this position it is not enough to prove that the total "estimated expense" shown by the orders for streets thus reduced the appropriation, even if these estimates are held to combine damages and costs of construction; for the liability of the city to pay therefor must have been actually incurred. The restriction of the right to contract which is invoked covers only all prior liabilities which were

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"payable therefrom." Its liability to pay damages did not accrue until the city had entered upon and taken possession of the land for the purpose of constructing the streets. Pub. Sts. c. 49, §§ 14, 69, 91. *Corey* v. *Wrentham*, 164 Mass. 18, 22, and cases cited. *Pegler* v. *Hyde Park*, 176 Mass. 101, 103. *Wheeler* v. *Fitchburg*, 150 Mass. 350, 352.

Bartlett Place and Carlton Street were among the new streets. Both were ordered constructed May 10, 1897, and under the lay out of each substantial land damages had been awarded, which, not being accepted, were afterwards increased as the result of trials in the Superior Court. The defendant admits that if these damages are not to be deducted it was free to make the contract. The decrees of the city council laying out each street might have contained a provision prescribing the time in which buildings should be removed and directing the delimitation of each way by the setting of bounds, and that notice be given to the owners of buildings to remove them. *White* v. *Foxborough*, 151 Mass. 28, 36, 37. *Taber* v. *New Bedford*, 135 Mass. 162. This was not done, but the orders for construction in each case authorized and directed the street commissioner, under the direction of the mayor, to construct the streets in accordance with the decree. The street commissioner was thus charged with the duty and, under the revised charter, clothed with authority to do whatever was required to carry out these orders unless otherwise directed by the mayor, who does not appear to have interposed. See St. 1893, c. 444, § 40.

The act of the city engineer in setting bounds showing the lines of these streets was not done under any order, ordinance or statute that imposed upon him the duty to take such action independently of the street commissioner.

Indeed the inference is that the work was done for his own convenience, as the agreed facts state that the street commissioner, who, on June 17, 1897, had notified the landowners to remove their buildings, did not direct the setting of bounds, neither did he know that they had been set.

There is a further uncontroverted statement by the street commissioner, which is incorporated in and made a part of the agreed facts, that "the first work done under my direction and with my knowledge as street commissioner for the purpose of

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the construction of these streets was on September 13," 1897; and this must be considered as fixing the date when possession was actually taken for this purpose.

A notice previously given to remove buildings, even if followed by their removal, from the proposed locations, though a significant act that might indicate an ultimate design to work the streets, does not constitute an entry upon or taking possession of the land, and is not sufficient to give the landowner a claim for damages for land taken. Pub. Sts. c. 49, §§ 14, 88. *Parker* v. *Norfolk*, 150 Mass. 489. *Corey* v. *Wrentham, ubi supra*. *Wilcox* v. *New Bedford*, 140 Mass. 570.

If no further steps are taken any expense to which he may be put by such preliminary measures is provided for by the express language of the statute, which gives to him full indemnity.

At the date of the contract, therefore, the liability to pay the awards had not arisen or become fixed, and the estimates made for this purpose were not "unpaid liabilities."

The defendant further contends that even if the order was valid, and the contract not prohibited, the street commissioner was not authorized to execute the agreement.

That the city council legally could authorize the building of the bridge must be taken as settled, and the authority of the street commissioner to act for the defendant may be found in the terms of the order itself. The language used is broad. He is not only "directed" but "authorized" to construct the bridge, and this implies something more than doing the work in the manner usually followed for making ordinary repairs of public ways. *Damon* v. *Granby*, 2 Pick. 345, 352.

The plan and details of construction submitted by the city engineer called for a large expenditure, and contained two estimates, one for a structure of stone, and the other for one of steel. It was decided finally by the order that the bridge should be built of stone, and this vote well might be construed independently of other considerations as giving to the street commissioner, if his action was approved by the mayor, the power to make the contract in behalf of the city for the labor and materials.

Under the revised charter the street commissioner also was one of the officers of the municipality, chosen by the city coun-

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cil. He had as such officer a general authority, in the management of his department, to make contracts not to exceed a certain amount, but beyond this sum, in order for a contract made by him to be binding upon the defendant, it was necessary to have the approval of the mayor. After the unrestricted order had been passed and the necessary appropriation made, this statutory power was sufficient to enable him, in conjunction with the mayor, to make the contract with the plaintiff. St. 1893, c. 444, §§ 18, 23, 32, 39, 40. See *Muldoon* v. *Lowell*, 178 Mass. 134, 138; *Stratton* v. *Lowell*, 181 Mass. 511.

It is true that the contract price was somewhat in excess of the proposed cost stated in the order, but this estimate was not a limitation of the amount to be paid for the bridge so that in making an agreement to pay more the street commissioner must be held to have exceeded his authority. The city council had not determined what sum should be expended for the work, and the amount named by them is to be treated as a mere expression of opinion, and not as a restriction the limits of which he could not exceed. *Keyes* v. *Westford*, 17 Pick. 273. It was thus left to him and the mayor to use their judgment in determining the final amount for which it should be built. As the plaintiff's bid was the lowest among those who competed for the work, and exceeded the estimate by only a relatively small amount, these officers, in an undertaking of this magnitude, could be found to have acted within their discretionary powers and for the benefit of the defendant in accepting it. The excess shown by the contract in the absence of fraudulent or corrupt conduct on their part does not render it voidable.

The defendant further urges that the plaintiff did not comply with the terms of the contract because after it began it did not complete the work within the time fixed. But this delay arose solely from the service on the parties of an injunction issued in the suit in equity to which reference has been made.

Whatever the rule may be in the case of a bilateral contract where ordinarily one party being ready and free to perform can put the other in default for damages, because the latter is prevented from performance by a contingency which was not foreseen or against which he should have stipulated, here neither could tender performance during the life of the injunction, as

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both parties were equally restrained from going on by operation of law. *Jones* v. *United States*, 96 U. S. 24. *Chicago, Milwaukee & St. Paul Railway* v. *Hoyt*, 149 U. S. 1. *Brown* v. *Royal Ins. Co.* 1 E. & E. 853. *Wareham Bank* v. *Burt*, 5 Allen, 113, 116, 117.

Nor was the plaintiff obliged to resort to the useless effort of seeking relief by asking for such modification as would enable it to perform a contract, the legality of which on the defendant's part was the only issue involved. To grant such a request would be equivalent to a decision of the main question, which could be determined only after a trial on the merits. And the case at bar is not parallel with the case of *Wilkinson* v. *First National Ins. Co.* 72 N. Y. 499, relied on by the defendant, where it was held that the plaintiff having been enjoined by strangers to the contract from receiving the proceeds of a policy of insurance furnished no sufficient reason for his failure to bring suit to recover on the policy before the period of limitation had expired within which by its terms such a suit must be begun. See also *Paul* v. *Fidelity & Casualty Co.* 186 Mass. 413.

Moreover, as the injunction did not operate to destroy the contract although their several obligations under it were thus temporarily suspended, when they were simultaneously relieved from disability by its dissolution, no legal advantage had been gained by one over the other by reason of the enforced delay. *Baylies* v. *Fettyplace*, 7 Mass. 325. *Baker* v. *Johnson*, 42 N. Y. 126. *People* v. *Globe Ins. Co.* 91 N. Y. 174. *O'Reilly* v. *Kerns*, 52 Penn. St. 214.

Whether the plaintiff, after the injunction had been dissolved, should immediately have gone forward, or was guilty of inexplicable delay, or whether there was a refusal by the defendant either to permit the plaintiff to perform, or to allow the city engineer to furnish the proper plans called for by the contract and which were necessary to enable it to go on with the work, or whether the lapse of time, which had occurred without fault of the parties, had gone far enough to make performance so expensive and burdensome that it would be unreasonable to require them to proceed further under it, were questions of fact which have been settled adversely to the defendant.

Other requests raised questions which relate to the effect to

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be given certain letters sent by the plaintiff to the mayor and city council, and to the conduct of the plaintiff after the dissolution of the injunction, by which it now is said that in seeking a modification of the terms of the contract, and making no attempt in good faith to carry it out, it must be held to have waived its right to insist upon performance by the defendant. In order to find for the plaintiff the presiding judge must have determined not only that the delay had not been unreasonable, but that the plaintiff did not itself intend either to terminate the contract or to accept a cancellation of it if offered by the defendant, and these requests became immaterial. And as a valid contract was proved, which was found to have been broken by the defendant, the first ruling asked, that "upon all the evidence, the plaintiff is not entitled to recover," could not be given. The remaining exceptions relate to the admission of certain evidence on the measure of damages, and in part to the rule adopted for their assessment, but these have not been argued, and we do not consider them.

Exceptions overruled.

OVILA BACHANT *vs.* BOSTON AND MAINE RAILROAD.

Worcester. October 6, 1904. — February 28, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Carrier. Railroad. Negligence. Evidence, Admissions and confessions, Competency. *Agency. Practice, Civil*, Exceptions.

Where a railroad has not provided a freight house for the storage of merchandise and consignees are expected to unload their goods directly from the cars after receiving notice that they are ready for delivery, it is the duty of the railroad company notifying a consignee of the arrival of goods to place the car containing them where it can be unloaded with safety and convenience, and a person coming with his team to unload the goods for the consignee, if shown the car by the station agent and told by him to "back up there; it is all right," is justified in relying upon this statement, and is not called upon to exercise constant observation to avoid injuries to his team from a train coming on a side track.

For a railroad company to give notice to a consignee that grain is ready for delivery, and to place the car loaded with the grain on a spur track where a team stationed to receive the grain will be struck by any train running upon a side track near the spur track, and then to run a train on the side track and injure

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the team of a person unloading the grain for the consignee is evidence of negligence on the part of the railroad company.

In an action against a railroad company for injury to the plaintiff's team while unloading goods from a car on a spur track of the defendant from being struck by a train run upon a side track near the spur track, statements made after the accident by the station agent of the defendant not in the performance of his duty as to the use of the spur track as a delivery track are not admissible against the defendant as admissions of liability, but evidence that the station agent told other consignees of freight or their servants to use the space between the spur track and the side track for the purpose of unloading goods from the cars is admissible, such statements being within the scope of the station agent's employment, and being competent to show that the method of unloading adopted by the plaintiff at the time of the accident was in accordance with the direction of the agent and the general course of business with others, and therefore should have been anticipated by the defendant.

No exception lies to the exclusion of a question where it does not appear what answer the witness was expected to make.

TORT for injury to the plaintiff's team from being run into by a train of the defendant as described in the opinion. Writ dated January 15, 1904.

At the trial in the Superior Court before *White*, J. the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, raising the questions stated by the court.

The case was argued at the bar in October, 1904, before *Knowlton*, C. J., *Barker*, *Hammond*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

A. T. Saunders, for the plaintiff.

C. M. Thayer, (*A. H. Bullock* with him,) for the defendant.

BRALEY, J. This is an action of tort to recover for injuries to the plaintiff's harnesses, horses and wagon, alleged to have been caused by the defendant's negligence while unloading grain from a car at its station in the town of Weston.

The defendant had not provided a freight house for the storage of merchandise, and apparently consignees were expected, on receiving notice that consignments were ready for delivery, to unload their goods directly from the cars.

In accordance with this system of dealing, the transportation of the grain could not be considered as ended or the carrier released by delivery until the consignees had been notified and the car placed where it could be unloaded conveniently by them. *Thomas* v. *Boston & Providence Railroad*, 10 Met. 472, 477. *Norway Plains Co.* v. *Boston & Maine Railroad*, 1 Gray, 263,

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272. *Kimball* v. *Western Railroad*, 6 Gray, 542, 544. *Rice* v. *Boston & Worcester Railroad*, 98 Mass. 212. *Rice* v. *Hart*, 118 Mass. 201, 208. *Independence Mills Co.* v. *Burlington, Cedar Rapids & Northern Railway*, 72 Iowa, 535.

By the location and arrangement of the defendant's tracks, to do this the car had been run upon a spur track so located that it could be reached and unloaded only from one side. To reach the car it was necessary to back a team into a triangular space between this spur track and a side track, which connected at each end with the main track, and was used to enable trains meeting at the station to pass each other. This space was shown by the testimony to be from ten to thirteen feet wide at the end near the highway, and gradually narrowing until it reached a point where the spur track joined the side track.

The plaintiff, who was under a contract with the consignees to unload the grain, sent his servant Coté with a team and the freight bill to the station. Upon delivery of the freight bill to the station agent, one Cole, who for this purpose represented the defendant, Coté testified that this conversation took place: "He showed me a car and told me to back up there; it was all right." In connection with the duty imposed on the defendant Coté was justified in relying upon this statement as an assurance that the place where the grain was to be unloaded was safe.

Two loads were taken out the first day without accident, but on the morning of the second day, when for the purpose of getting the third load the wagon and horses were placed between the tracks with the wagon close to the side of the car, and opposite the door, they were struck and damaged by one of the locomotives of the defendant that was passing over the side track.

On this evidence the jury could have found that they were there properly with the knowledge and direction of the defendant's agent, and that in backing up to the car in the manner described, as safe a position was taken as any that could have been occupied at the time of the accident.

It could have been found further that the car while being unloaded was in such a place that the team would be likely to be struck by passing trains, and that a proper place for the delivery of the grain had not been provided.

Under its contract as a common carrier the defendant was

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required to provide a safe and proper place for delivery. *Jewell* v. *Grand Trunk Railway*, 55 N. H. 84, 91. *Independence Mills Co.* v. *Burlington, Cedar Rapids & Northern Railway*, *ubi supra*. *Anchor Mill Co.* v. *Burlington, Cedar Rapids & Northern Railway*, 102 Iowa, 262.

The plaintiff, or his servant, while unloading, was not obliged to be in a state of continual apprehension that locomotives or cars might run over the side track and come into collision with the team, nor was he required constantly to observe the track to avoid such a collision. He had the right to assume that while thus engaged, at a place designated by the defendant, he would not be subjected to injury in person or property by its negligence. *Pratt* v. *New York, New Haven, & Hartford Railroad*, *ante*, 5.

Neither the consignees nor those lawfully acting for them were obliged thus to take the chance of injury, and they were entitled while at work in the place prescribed by the defendant to be free from the danger of being run down by trains in its control. *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368, 372. *Hathaway* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 286, and cases cited.

To place the car, and then to run its locomotive so that it came into collision with the team, was evidence of negligence in the management of its business at the station. Both acts showed a breach of duty towards the plaintiff on the part of the defendant. *Hathaway* v. *New York, New Haven, & Hartford Railroad*, *ubi supra*.

At the trial the jury were instructed that if the plaintiff's servant had obtained permission from the station agent to unload the grain he thereafter assumed any risk incident to the situation, and the plaintiff could not recover.

But the case before us is not parallel with *Miner* v. *Connecticut River Railroad*, 153 Mass. 398, where the doctrine of *volenti non fit injuria* was applied. There was evidence in that case not only showing knowledge on the part of the person in charge of the plaintiff's horse of the danger of going into the freight yard, but that fully appreciating the danger he voluntarily entered the yard, and that upon request he could have had the car moved to another and suitable place before being unloaded. Here the grain if delivered at all, must be taken out

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where the car was placed by the defendant, and it also appears that if Coté's evidence was believed he did not know there was danger from collision with trains passing over the side track.

When this erroneous view of the law was stated in the first part of the instructions no exception appears to have been taken. But in a later portion of the charge, to which the plaintiff did except, the same doctrine was repeated in these words: "Cole says he came up there in the ordinary way and asked for the shipping bill and the number of the car was given him and the shipping bill was given him and that was all there was to it. If that is all there was to it then your verdict should be for the defendant."

The jury must have understood from this instruction that it was not the duty of the defendant to provide a safe place for the delivery of goods, and that the plaintiff's servant after he knew where the car was, took his chance of unloading the grain at such time, and in such way as would suit the convenience of the defendant in the running of its trains, and that constant observation would be required by him to avoid injury.

This instruction was wrong, and as an exception was properly saved it must be sustained.

The remaining exceptions relate to the exclusion of evidence. Whatever was said by the agent after the accident relating to the use of the spur track as a delivery track was a statement not made by him in the performance of his duty, and could not bind the defendant as an admission of liability. *Boston & Maine Railroad* v. *Ordway*, 140 Mass. 510, 512. *Wellington* v. *Boston & Maine Railroad*, 158 Mass. 185.

The question put to the civil engineer, and excluded, does not appear to have prejudiced the plaintiff, for it is not shown what answer the witness was expected to make. *Lee* v. *Tarplin*, 183 Mass. 52, 54.

But the exclusion of evidence that the space between the spur and side tracks was the place which other consignees of freight, or their servants, were told by the station agent to go into, or use, for the purpose of unloading goods from the cars was wrong.

Such instructions given by the agent were within the scope of his employment, and binding on the defendant. *Lane* v. *Boston*

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& Albany Railroad, 112 Mass. 455. And it was competent for the plaintiff to show that the defendant's customary way of delivering freight generally, was to run cars upon the spur track to be unloaded, and that while unloading the consignees would have to drive in between the spur track and the side track. It consequently would follow that the method adopted by the plaintiff at the time of the accident was in accordance with the direction of the agent and the general course of business with others, and hence should have been anticipated by the defendant. While the transfer was being made it was bound to see that neither the plaintiff nor his property was injured by any act of negligence on its part. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379, 382.

Exceptions sustained.

DAVID A. LYNCH *vs.* M. T. STEVENS AND SONS COMPANY.

Essex. November 2, 1904. — February 28, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability. *Practice, Civil*, New trial, Verdict.

If a workman in a factory is injured by a machine starting of itself after he has stopped it, through a defect which it was the duty of a foreman to remedy and of which the foreman had notice, and if the foreman on the day before the accident promised to repair the machine to prevent its starting in this way and assured the workman before he went to work on the day of the accident that the machine was all right, the workman has a right to rely on this assurance, and the employer is liable to the injured workman both at common law and under the employers' liability act.

In an action for personal injuries by a workman against his employer, with counts both under the employers' liability act and at common law, if the plaintiff on the evidence is entitled to recover at common law as well as under the act, but the judge states that he shall submit the case to the jury only under the statute and in his charge does not specify how he leaves it to them and does not mention the limit of damages, under the practice which has grown up in this Commonwealth the defendant's counsel has the right to assume that the case is going to the jury only on the counts under the statute, and if the jury find generally for the plaintiff in a sum in excess of $4,000, the plaintiff can be made to relinquish his damages in excess of that sum or be compelled to try his case again, although the defendant in excepting to the ruling of the judge that the plaintiff was entitled to go to the jury under the employers' liability act did not

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ask the judge to order a verdict for the defendant on the common law counts, and although the plaintiff was entitled to go to the jury on all the counts and to recover at common law as well as under the statute.

LORING, J. This was an action to recover for the loss of a hand caused by a wool picker starting automatically from a dead stop while the plaintiff was cleaning the machine as he had been told to do. The machine was operated by a belt which came up through the floor and passed over a tight or a loose pulley on the machine as it was moved from one pulley to the other by a shipper handle. This belt and these pulleys were entirely covered by wooden casings and could not be seen by the operator of the machine. At the time of the accident the plaintiff was sixteen years of age and had been at work in the picker room for two weeks. He testified that during the first week of his employment in that room he saw the machine start automatically; that he reported this to the foreman who hired him and had charge of the room; that the foreman promised to fix it; that he went to the foreman's office the next morning before he began work and asked if the machine was all right, and the foreman said it was. The loose pulley was slightly convex, and one eighth of an inch smaller than the tight pulley. The belt was always in motion and when on the loose pulley was intended to run around it loosely, without setting the machine in motion. There was evidence that there was too much vibration on the loose pulley, caused by the shaft being worn, that the belt was too tight, and that under such circumstances, when the belt had been thrown on to the loose pulley it might automatically work back on to the tight pulley.

This entitled the plaintiff to go to the jury on the common law ground that the machine was defective through the defendant's failure to perform the duty owed by it, from which it is not released by committing the performance of it to its servants, (for similar cases see *Gregory* v. *American Thread Co.*, *ante*, 239, and cases there cited,) as well as on the ground that there was a defect in the machinery under R. L. c. 106, § 71, cl. 1, of which the defendant's foreman, who had charge of its repairs, had notice, and which through his negligence was not remedied.

The plaintiff had a right to rely on the assurances given by the foreman the day after he promised to "fix" the machine

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that it was all right. *Gregory* v. *American Thread Co., ubi supra. Mooney* v. *Connecticut River Lumber Co.* 154 Mass. 407.

The defendant's main contention on the merits is that the plaintiff is prevented from recovering by his negligence in not plugging the shipper handle after it had been pulled away from the machine as far as it would go, which there was evidence that he did and which was the proper thing to do to stop the machine. There was a cleat back of the machine, with holes in it, and there was a hole in the handle of the shipper. On the part of the defendant there was evidence that a plug was furnished by it for this purpose. But the plaintiff and other witnesses testified in his behalf that there was none.

The defendant also contended that so far as the employers' liability act was concerned the plaintiff was barred by R. L. c. 106, § 77, because he had not asked for a plug. In this connection the defendant relies on the plaintiff's testimony, "That he knew that if a plug was pushed through the hole of the shipper handle into the hole in the cleat directly behind it . . . it would hold the shipper handle firmly in place, but that there was no plug there for that purpose and had never been during the time he had worked for the defendant, and that he had never been instructed that a plug was necessary, and that he did not know that it was necessary in order to hold the shipper handle from moving; and that he never complained of its absence." But the plaintiff also testified "that this [pushing the shipper handle back] was all he ever did or ever saw done, or was ever told to do or ever understood was necessary to be done when he wished to keep the machine from running while he was in the employ of the defendant"; and an expert testified in his behalf "that even if a plug had been used to secure the shipper handle when the belt was running on the loose pulley . . . a belt as tight as this one was might have started the machine from the loose pulley."

This brings us to the main question argued at the bar, which is presented by the following report of the presiding judge: "At the close of the evidence the defendant asked the judge to rule that the action could not be maintained. The judge remarked that he thought the action could be maintained under the employers' liability act and said he would so rule. The de-

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fendant excepted, and the plaintiff did not. This was said at the bar in the presence of the jury, but nothing further was said concerning it, and the judge's charge is annexed at the request of the parties. The jury returned a verdict of $8,500. Subsequently the defendant made a motion to set aside the verdict, which motion is annexed. The plaintiff now contends that this intimation or ruling (as stated above) on the part of the judge that the action could not be maintained at common law was erroneous and was not a ruling, and as nothing was said to the jury at the time concerning it or subsequently in the charge, the verdict should stand for the full amount."

The judge reported the case as follows: "I am now of the opinion that the plaintiff had a right to go to the jury on all the counts, but as at the trial I stated or ruled as before stated, that he had not that right, I am of the opinion that the verdict cannot stand for the full amount, but I report the case for the consideration of the Supreme Judicial Court. If under the facts herein stated the verdict can stand for the full amount thereof judgment is to be entered thereon. If the verdict cannot stand for the full amount, but can stand for $4,000, it is to stand for that amount, provided the plaintiff waives in writing all of the verdict over that sum. If the verdict cannot stand for either amount, the same is to be set aside, or such order is to be made as law and justice require."

The judge's charge is made part of the report, and the defendant and plaintiff have argued, respectively, from what the judge said in his charge, that the case was and was not left to the jury under the employers' liability act alone.

Where, as in the case at bar, there are several counts for the same cause of action and the presiding judge rules that the plaintiff has not made out in proof the allegations of one or more of them, or for other reasons cannot have a verdict on some of the counts, it is a usual practice in this Commonwealth not to direct a verdict for the defendant on those counts or otherwise dispose of them before submitting the case to the jury, but to submit the case to the jury on the other counts. It is not material how the practice grew up, or whether it ought to have grown up. It is in fact the practice, and the defendant's counsel had a right to rely on it in the case at

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bar. There was nothing in the charge which told him that the case was not being left to the jury as the presiding judge had stated that it would be left to them, namely, on the counts under the employers' liability act. It is true that the jury were not told that they were restricted to a verdict of $4,000 in amount. But if the defendant's counsel thought that his chance of getting a verdict for less than $4,000 was better without any reference being made to that sum than if an instruction was given on the point, he was not bound to have the jury instructed on it and told that they were restricted to a verdict not exceeding $4,000. In the case at bar he had the unrevoked statement of the presiding judge that the case was to be submitted on the counts under the statute and a charge which was at least neutral, so far as the question went of its being a charge at common law or under the employers' liability act. Under the practice of which we have spoken he had a right to assume that the case was submitted to the jury on statutory counts only.

The error which the defendant has shown is that the counts on which the case must be taken to have been submitted cannot carry a verdict beyond $4,000 in amount.

At the argument the plaintiff's counsel insisted that he was not called upon to take an exception until the judge made a ruling that the plaintiff could not recover on the common law counts; that the presiding judge never made that ruling; that he went no further than to state that he intended to make it; that he (the plaintiff's counsel) waited until the presiding judge should direct the jury to render a verdict for the defendant on the common law counts, intending to except to that ruling then, namely, when it was made. But even if we were of opinion that the practice ought to be what the plaintiff's counsel assumed it to be, it is not in fact the only practice in use, and in our opinion the case must be disposed of on the practice which has in fact obtained.

The plaintiff will have to try the case again if he wishes to recover at common law. It is plain that the cause of his being put to this is a loose practice in dealing with the different counts in cases such as that now before us. But the question of the correctness or desirability of what is in fact the practice is not now before us.

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In accordance with the terms of the report a majority of the court are of opinion that the entry must be that the verdict is to stand for $4,000, provided the plaintiff waives in writing all of the verdict over that sum; otherwise, a new trial is to be had.

So ordered.

The case was argued at the bar in November, 1904, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Loring*, JJ., and afterwards was submitted on briefs to all the justices.

W. S. Knox, (*W. Coulson* with him,) for the defendant.
F. N. Chandler, (*F. H. Eaton* with him,) for the plaintiff.

CORDELIA G. ROBERTS *vs.* LYNN ICE COMPANY.

Essex. November 2, 1904. — February 28, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Landlord and Tenant. Fixtures. Contract, Construction. *Words*, "Use", "Use and benefit."

The lessee of a building and the land on which it stands under a lease in writing must pay the full rent although the building is destroyed by fire during the term, unless the lease contains a provision to the contrary, but one who has the use of the premises as a licensee under a contract that he shall have such use for a specified time at an agreed compensation is not bound to pay for the use of the building after its destruction by fire.

Although an ice house built by a lessee of the land on which it stands may be made personal property by agreement, an ice house built by the owner of the land is real estate.

An instrument in writing, by which a landowner lets to an ice company his ice business and privileges in a certain city "with the use and benefit of his ice houses" for a period named, is a lease of the ice houses and the land under them and not a mere contract for the use of the ice houses as licensee, and if the ice houses are destroyed by fire during the term the full rent none the less must be paid.

Whether an instrument in writing is a lease or a contract for the use of the premises as licensee is a question of law.

CONTRACT for $1,525 of rent alleged to be due under an instrument in writing alleged to be a lease, with a second count for the same sum for use and occupation of the premises. Writ dated January 7, 1903.

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There was an answer and a declaration in set-off. In the Superior Court the case was tried before *Schofield*, J., without a jury. He found for the defendant on the first count of the declaration, and on the second count found for the plaintiff in the sum of $632.34. Upon the declaration in set-off the judge found for the defendant in the sum of $21.51. Upon the whole case the judge found that the plaintiff was entitled to judgment in the sum of $610.83, and at the request of the plaintiff reported the case for determination by this court. If the finding was right upon the facts reported competent to be considered, judgment was to be entered for the plaintiff in the sum of $610.83, with interest from the date of the finding. If the finding was erroneous upon the facts reported competent to be considered, it was to be set aside, and such judgment was to be entered or such order was to be made as law and justice required.

The instrument declared upon in the first count was as follows:

"Memorandum of Agreement, made this twenty-ninth day of January, 1898, by and between B. F. Roberts, of Lynn, and the Lynn Ice Company, a corporation having its usual place of business in said Lynn.

"Witnesseth, That said Roberts has, and hereby does, let to said Ice Company his ice business and privileges in said Lynn, at Flax Pond, with the use and benefit of his ice houses together with the engines, chains, runs, the said engine, chains, and runs to be put in good order and delivered to said Company by said Roberts; with the right to pass and repass, in the transaction of said ice business, over and upon a court or way owned by said Roberts, to said ice houses for the term ending December 15, 1898. The houses to be cleared of ice by the first day of October and left ready for repairs.

"Said Lynn Ice Company agrees, in consideration of the aforesaid letting to them, to pay said Roberts the sum of fifteen hundred and twenty-five dollars ($1,525.00), which sum shall be paid to said Roberts as follows: Five hundred dollars ($500.00) on the fifteenth day of October next; five hundred dollars ($500.00) on the fifteenth day of November next; and five hundred and twenty-five dollars ($525.00) on the fifteenth

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day of December next, at the termination of this agreement. These payments to be conditioned upon the amount of ice which Z. J. Chase & Son, Coolidge and Livermore and J. L. Swan, or the Independent Ice Company shall be able to cut and house from said Flax Pond; the proportion of said full sum to be paid by said Lynn Ice Company to be the proportionate amount of ice cut and housed by said firms.

"Witness our hands and seals the day and year first above written. The Lynn Ice Company [seal], by Albert H. Wyer, Treasurer. B. F. Roberts [seal]."

The following extensions and agreements were indorsed on the instrument:

"Lynn, March 13–99. In consideration of one dollar to him paid the receipt of which is hereby acknowledged, I hereby agree to continue the within contract for the term ending December 15, 1899 as per the conditions contained therein. Witness our hands and seals the day and year first above written. The Lynn Ice Company [seal], by Albert H. Wyer, Treasurer." [Signature of witness.]

"Lynn, January 3rd, 1900. In consideration of one dollar to me paid, the receipt of which is hereby acknowledged, I hereby agree to continue the within contract for the term ending December 15th, 1900 as per the conditions contained therein. Witness our hands and seals the day and year first above written. Cordelia G. Roberts [seal]. The Lynn Ice Company [seal], by Albert H. Wyer, Treasurer." [Signature of witness.]

"Lynn, Dec. 21, 1900. In consideration of one dollar to me paid, the receipt of which is hereby acknowledged, I hereby agree to continue the within contract for the term ending Dec. 15, 1901 as per conditions contained therein. The Lynn Ice Company [seal], by Albert H. Wyer, Treasurer. Cordelia G. Roberts, Executrix" [seal]. [Signature of witness.]

"Lynn, Jan. 27, 1902. In consideration of one dollar to me paid, the receipt of which is hereby acknowledged, I hereby agree to continue the within contract for the term ending Dec. 15, 1902 as per conditions contained therein, subject to the following change: In case an artificial Ice Plant is established in Lynn, then the following agreement to take the place of the former, The Lynn Ice Co., to put up the Ice at their own ex-

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pense and pay for the am't. they are able to sell or use under the new conditions. The price to be at the rate of the old contract, and it is further agreed that all ice remaining in the Ice Houses after Dec. 15, 1902 shall revert to Mrs. C. G. Roberts. The Lynn Ice Company [seal], by Albert H. Wyer, Treasurer. Cordelia G. Roberts, Executrix [seal].

"Lynn, Dec. 21, 1900. In consideration of one dollar to me paid, the receipt for which is hereby acknowledged, I do grant the Lynn Ice Company permission to move old engine and replace it with one of their own, and it is hereby agreed that they shall remove it also at their pleasure the same to be without expense to my estate. Cordelia G. Roberts, Executrix."

Benjamin F. Roberts died on November 29, 1898, and the plaintiff was appointed executrix under his will. On the night of June 4, 1902, without fault on the part of either the plaintiff or the defendant, the ice houses, four in number, were destroyed completely by fire. They were not insured. After the fire the defendant made no use of the property described in the lease or contract, except to drive teams over the court adjoining the ice houses to a factory owned by the defendant, and this use of the court was not under the instrument sued upon.

The case was argued at the bar in November, 1904, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Loring*, JJ., and afterwards was submitted on briefs to all the justices.

W. H. Niles, (*I. B. Keith* with him,) for the plaintiff.

J. E. Odlin, for the defendant.

LORING, J. The plaintiff's right to recover on the first count depends upon the character of the instrument originally executed by the plaintiff's husband and extended by her after his death. If it was a lease, the ice houses were the property of the defendant for the term ending December 15, 1902, and the loss caused by their being burned to the ground is the defendant's loss for the unexpired part of that term a portion of a year. If on the other hand the defendant under the instrument here in question was as matter of contract to have the use of the ice houses as a licensee under the plaintiff, the plaintiff was the owner of them at the time of the fire, and the loss falls on her. Furthermore in that case the plaintiff has not furnished that for which by the terms of the contract she was to be paid, namely,

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the use of her ice houses, and the sum stipulated for is not due. So much is settled by *Wells* v. *Calnan*, 107 Mass. 514.

The question presented by this case therefore is the question of the construction of this instrument originally made by Roberts on January 29, 1898, and extended by the plaintiff, his widow, on January 27, 1902. By it as originally drawn, Roberts "does let to said Ice Company his ice business and privileges in . . . Lynn, at Flax Pond, with the use and benefit of his ice houses, . . . for the term ending December 15, 1898." The extension of this instrument here in question was dated January 27, 1902; the term was extended to December 15, 1902; and it is found by the presiding judge that "After the agreement of January 27, 1902, was executed, the defendant corporation by its servants and agents took possession of the ice houses and machinery and began to cut ice and filled the ice houses."

There is nothing in the defendant's contention that these ice houses are personal property. It is true that they are of such a construction that had they been put up by some one other than the owner under an agreement to that effect, they would have been personalty. See *Antoni* v. *Belknap*, 102 Mass. 193; *Handforth* v. *Jackson*, 150 Mass. 149. But being put on the land by the owner of it in fee they became a part of the realty.

The question whether an agreement as to the use of real estate is a lease of it or is a contract by which the owner enters into an agreement to give to the other party to the contract the use of it as a licensee under him, generally has arisen, in this Commonwealth, in case of contracts as to the use of specified rooms which are part of a building. That is to say, the question in those cases has been whether the other party to the contract was a lodger or a tenant. The question there and in the case now before us is decided by determining whether as matter of construction, the contract gave the other party exclusive possession of the premises against the world including the owner, or gave him a license to occupy under the owner, in which case the rights of the other party rest in contract. See on the one hand *Swain* v. *Mizner*, 8 Gray, 182; *Young* v. *Boston*, 104 Mass. 95; *Porter* v. *Merrill*, 124 Mass. 534; *Fiske* v. *Framingham*

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Manuf. Co. 14 Pick. 491; and on the other hand, *White* v. *Maynard*, 111 Mass. 250; *Central Mills* v. *Hart*, 124 Mass. 123; *Hamblett* v. *Bennett*, 6 Allen, 140.

The character of the instrument in the case at bar would hardly have been questioned had the thing let been the ice houses in place of "the use and benefit" of them. And although the word "use" is ordinarily employed when the owner contracts to give another person under him a right to occupy as a licensee, yet the words here are not "the use of" but "the use and benefit of" the ice houses, and the defendant took exclusive possession of them under the lease. The words "use and benefit" are words of wide application, and mean the entire beneficial interest in the property in question. See *Smith* v. *Harrington*, 4 Allen, 566; *Paine* v. *Forsaith*, 86 Maine, 357; *Lawe* v. *Hyde*, 39 Wis. 345; *Heaston* v. *Board of Commissioners*, 20 Ind. 398, 403. It is conceded in the case at bar, for example, that the plaintiff took a life interest at least in the real estate of her husband under a devise to her of all the residue of his estate "for her use and benefit during her life," and it would have to be conceded that the remainder vested in fee in the grandson under a devise to him after her death "for his use and benefit." And see *Lewis* v. *Shattuck*, 173 Mass. 486. In *M'Cullough's appeal*, 4 Yeates, 23, it was held that a devise to a wife of "the benefits of all my real estate" was a devise of the real estate. The conclusion was reached on the ground that a devise of "the benefits" of real estate was equivalent to a devise of the profits of real estate, and it is settled that such a devise is a devise of the land. Co. Litt. 4 b. *Parker* v. *Plummer*, 1 Cro. Eliz. 190. *Stile* v. *Tomson*, Dyer, 210.

A majority of the court are of opinion that the instrument in question gave the defendant exclusive possession of the ice houses and of the land under them at least, that it was a lease of this real estate and not a contract for the use of it as a licensee under the plaintiff; and therefore the case comes within *Fowler* v. *Glover*, 4 Dane Abr. 383; *S. C. nom. Fowler* v. *Bott*, 6 Mass. 63; *Bigelow* v. *Collamore*, 5 Cush. 226, 231; *Kramer* v. *Cook*, 7 Gray, 550; *Leavitt* v. *Fletcher*, 10 Allen, 119, 121; *Wells* v. *Calnan*, 107 Mass. 514, 518. Since the defendant had an estate in the land under the ice houses at least, the case does not come within

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Stockwell v. *Hunter*, 11 Met. 448, and *Shawmut National Bank* v. *Boston*, 118 Mass. 125.

The only other contention made by the defendant is that whether this was such a contract or a lease is a question of fact, and so not open for review here. There is nothing in that. The question is the question of the construction of this agreement and that is a question of law.

Judgment for the plaintiff on the first count for $1,525, with interest, less $21.51 found to be due in set-off.

WILLIAM D. ELLIS *vs.* LOUIS T. BLOCK & others.

Suffolk. November 9, 10, 1904. — February 28, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Contract, Construction, What constitutes. *Practice, Civil*, Verdict.

In an action of contract, where it appears that oral negotiations between the parties were followed by a correspondence in writing, the questions, whether a contract was made in part by word of mouth and in part by the correspondence in writing, and if so what that contract was, finally must be passed upon by the jury under proper instructions from the court, but in giving such instructions the court must deal with the question whether the correspondence in writing properly interpreted changed the mere negotiations, if they were such, into a contract.

In an action for breach of a contract, alleged to have been made by the defendants, to form a proposed corporation and employ the plaintiff at a certain compensation to sell its stock, two letters of the defendants to the plaintiff, one stating that all overdue accounts must be settled before any preparations can be made and another stating that the defendants wish to syndicate their plants but cannot do it so long as their overdue accounts are unpaid, and that if the collecting of the accounts is attended to quickly by the plaintiff both the plaintiff and the defendants can make some money, do not constitute an acceptance of a proposition previously discussed by the parties that the plaintiff shall remain in the employ of the defendants as their agent until the outstanding debts are collected and that the defendants then shall form a corporation and employ the plaintiff to sell its stock.

If a presiding judge after the return of a verdict questions the jury as to the grounds on which the verdict was rendered the answers of the jury have the effect of special findings.

In an action of contract against the members of a firm on an alleged contract to employ the plaintiff for a certain purpose at a compensation named, the plaintiff testified to a conversation between himself and one of the defendants which the plaintiff contended constituted an oral contract. The defendant who took part

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in the conversation testified that it consisted of a proposition made by the plaintiff to which he returned an evasive answer. Certain letters written by the same defendant were introduced by the plaintiff which he contended made a binding contract if the oral conversation did not. The defendants contended that if the agreement was oral it was not to be performed within a year, so that the action was barred by the statute of frauds. The presiding judge instructed the jury that if the conversation was a mere proposition on the part of the plaintiff it was for the jury to say whether the defendants accepted the proposition by the letters. This was erroneous, as the letters were not susceptible of such a construction. The jury returned a verdict for the plaintiff, and in answer to a question by the judge stated that they had considered the statute of frauds and also the liability of the firm for the acts of the partner. The plaintiff contended that the special findings contained in this answer cured the error of law in the instruction of the judge in regard to the effect of the letters, as the questions of the statute of frauds and of ratification arose only in case the contract was an oral one made before the letters were written. *Held*, that the special findings in the answer of the jury did not cure the error, as the findings could not be extended beyond the statement that the statute of frauds and ratification had been considered, and did not show that the verdict might not be founded on an acceptance of an oral proposition by the letters.

CONTRACT, against Louis T. Block, Joseph E. Block, Samuel Block and Edward J. Mack, copartners doing business at Cincinnati in the State of Ohio under the firm name Elias Block and Sons, with five counts, the first for an alleged breach of contract more particularly stated in the fourth count substituted by amendment, the second for alleged services in collecting accounts for the defendants, the third and fifth on accounts annexed, and the fourth alleging a breach of a contract, by which the defendants, the owners and operators of a distillery in Kentucky, called the Darling Distillery, agreed that the plaintiff, who had been the eastern agent of the defendants, should continue in their employ and should assist the defendants in the organization of a corporation of which the plaintiff should sell the capital stock, receiving as compensation the sum of $50,000. Writ dated May 26, 1898.

The answer contained a general denial and an allegation of payment, and set up the statute of frauds. At the trial in the Superior Court before *Harris*, J. the jury returned a verdict for the plaintiff on the fourth count, at first in the sum of $15,000, and afterwards, adding interest from the date of the writ by instruction of the judge, in the sum of $19,322.50. Upon the claim of the plaintiff for $2,000 for services in collecting accounts for the defendants, as alleged in the second count and in the first

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items of the third and fifth counts, the jury found for the defendants. The defendants alleged exceptions, raising the questions stated by the court.

The tenth ruling requested by the defendants was as follows: "That the letters introduced into this case do not constitute a contract in writing on which recovery can be had in this action."

The third ruling requested by the plaintiff was as follows: "If the jury find that the contract of promotion alleged was not concluded at the interview in June, 1896, and if the plaintiff then requested the defendants to enter into the following contract with him, that is, that if the plaintiff should remain in the defendants' employ and endeavor to collect in their outstanding accounts the defendants would incorporate their distilleries, employ him to sell the stock in the corporations so to be formed and pay him therefor $25,000 in cash and $25,000 in said stock, and the defendants said they would consider the matter and let the plaintiff know later, then the letters of March 12, 1897, and March 19, 1897, would constitute a binding contract to that effect."

C. W. Bartlett & A. C. Burnham, for the defendants.

S. L. Whipple & D. A. Ellis, for the plaintiff.

LORING, J. We are of opinion that there was a mistrial in this case.

The plaintiff testified that at an interview in Boston between himself and the defendant Louis T. Block, had in June, 1896, Block offered on behalf of the defendant firm to pay him $50,000, in addition to the compensation he was entitled to as their agent in New England, if he would remain with them as their agent until the outstanding accounts were collected, and place so much of the capital stock of a corporation with a capital of $500,000, which he agreed should be formed to take over the defendants' Darling Distillery; that the plaintiff accepted the offer and agreed to buy $25,000 of the stock. During the conversation Block told the plaintiff that he was to be the selling agent, and in answer to the plaintiff's question: "When do you want to do this?" the plaintiff testified that Block said: "We cannot do it now, as you know the condition of the whiskey market is in terrible shape. We cannot do it until next year, until you collect your accounts."

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Louis T. Block testified that it was the plaintiff who at this interview suggested the idea of incorporating this distillery, and that he did not refuse, but gave him an evasive answer to induce him to continue with them as their agent because they had some $50,000 of accounts outstanding, resulting from sales made by the plaintiff which no one could collect so well as he could.

After telling the jury that if the matter was concluded at the interview in June, as the plaintiff testified, he was entitled to a verdict unless the statute of frauds stood in the way, the presiding judge gave them this further instruction: "If, on the other hand, it was simply a proposition, a matter talked over, laid aside for future consideration and future dealing, then, if it was left open, it was not a contract, it was a mere thing discussed, and it would be for you to say then whether, out of the evidence that the parties have presented in the correspondence, there was ever an agreement of the minds of the parties upon the definite terms of a new and another contract, at another time than on the 11th of June, '96, but having the same terms and the same conditions, which were expressed in writing. You will have the evidence before you, and I cannot instruct you upon the facts, because, the way this case stands before you, it is for you to pass upon that question."

We are of opinion that there is nothing in the subsequent correspondence which warranted such a finding. As the question was a question whether a contract, and if a contract what contract, was made in part by word of mouth and in part by written correspondence, the matter had to be passed upon by the jury under proper instructions from the court.

But whether the written correspondence made the previous oral negotiations into a contract (if the jury found that what was said in June amounted to no more than negotiations) was a matter to be dealt with by the court in its instructions to the jury. Had the previous negotiations been carried on in writing the question would have been for the court whether the subsequent letters concluded the matter, by converting what had been no more than negotiations into an obligation. That question was none the less for the court because the negotiations had been carried on by word of mouth. The only difference is that in the former case the whole question of the contract is for the

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court while in the latter case it is for the court to deal with the question which is for it in its instructions to the jury, and to leave the whole question under those instructions to the jury. See *Bascom* v. *Smith*, 164 Mass. 61; *Aldrich* v. *Bay State Construction Co.* 186 Mass. 489.

The plaintiff contends that the subsequent correspondence did make the previous negotiations into a contract, and he rests his contention to that effect on the plaintiff's letter of March 12, 1897, the defendants' answer of March 15 and their letter of March 19. In his letter of March 12, 1897, the plaintiff wrote: "I would like to know if there is anything in it about your bonding your distilleries; if so let me know, as I would like to prepare myself for it." On March 15 the defendants wrote in answer: "Regarding the bonding of our distilleries can only say that all the overdue accounts must be settled up before we can make any preparations to that end; we need funds and are forced to use extra efforts to accomplish and satisfy our wants." On March 19 the defendants wrote: "We want to syndicate our plants, but cannot do it as long as those overdue a/cs are unpaid. We can both make some money if you attend to this matter quickly. Let us hear from you."

The most that can be claimed for the answer of March 15 is that no preparations were to be made until the overdue accounts were settled up. That is not the assumption of an obligation that preparations shall then be made. And the most that can be claimed for the letter of March 19 is an expression of a "want" on the defendants' part to have the distillery in question incorporated; but that stops short of an assumption of an obligation on their part to incorporate it, as had been proposed by word of mouth. The matter is not helped by the further statement that if the collecting of the accounts is attended to quickly both can make some money. What the plaintiff seeks to accomplish by these letters is to turn what Louis T. Block refused to put the firm under obligation to do, when he talked with the plaintiff in June, into an obligation on their part. At that time Block's testimony was that he gave an evasive answer; said he would talk with his brothers about it and write to him. But if it be assumed that this was that writing, it falls short of being a promise and it falls short of making those negotiations

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into an obligation. It is obvious that a person who rested content with these letters did not think it was wise to push the matter to a conclusion at that time.

The more difficult question is whether the defendants are entitled to complain of this mistrial.

The plaintiff contends that the tenth ruling asked for by the defendants is to be construed to mean that the letters alone, that is to say, apart from any oral testimony, do not constitute a contract in writing. He admits that they do not. More than that, he says that he never contended that they did; that what he contended was that if the jury found that the conversation in June did not result in an agreement they could find that the letters in March, 1897, (Exhibits 6, 7, 8,) amounted to a renewed offer by the plaintiff of this same proposition and an acceptance thereof by the defendants. But that would not be a contract in writing. And he contends that for these reasons the ruling (being construed as he insists it should be construed) had "no real relation to the case and could be refused by the court." It seems plain that this was not what any one at the trial understood this ruling to mean. The plaintiff in the third ruling requested by him fell into a part of the inaccuracy which he now finds with the defendants' tenth request: "then the letters of March 12, 1897, and March 19, 1897, would constitute a binding contract." And the presiding judge, in the portion of the charge now under consideration, tells the jury that they can find that these letters made a new contract "which was expressed in writing." More than that, if the ruling was understood to mean what the plaintiff now says it meant, it must have been refused, as the plaintiff now says it could have been refused, or it might have been given as a preliminary instruction to clear the way for the jury to approach the question on which the case really turned. But neither was done. On the contrary the presiding judge said that he thought he had given the instruction in substance. What the presiding judge must be taken to have meant when he said that is not altogether clear. What he did was to leave the construction of these letters to the jury, and, as they construed them to be or not to be a promise on the part of the defendants to do what was proposed in June, they were to find that they did or did not make out a contract. By so doing he refused the

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plaintiff's third request that the letters as matter of law "would constitute a binding contract to that effect." The most plausible explanation is that the presiding judge at the moment thought that if he refused the ruling requested by the plaintiff he gave that asked by the defendants. But that is not so. He did not give the tenth in words or in substance, and the defendants, by excepting to the refusal to give the tenth ruling and to the charge so far as it was inconsistent with it, saved their rights. See in this connection *Commonwealth* v. *Meserve*, 154 Mass. 64, 75; *Brick* v. *Bosworth*, 162 Mass. 334.

In *Fairman* v. *Boston & Albany Railroad*, 169 Mass. 170, and in *Commonwealth* v. *Quinn*, 150 Mass. 401, relied on by the plaintiff, there was no special ruling requested covering the point on which there was a misdirection, as there was in the case at bar. In the other case relied on by him, *Dixon* v. *New England Railroad*, 179 Mass. 242, there was a general exception to a long charge, not an exception to it so far as it was inconsistent with the rulings requested.

The verdict first brought in was a general verdict for the plaintiff in the sum of $15,000, although two separate causes of action had been tried and submitted to the jury. This led the presiding judge to question the jury as to the grounds on which they rendered their verdict. Among other questions the presiding judge asked if the jury had considered the statute of frauds, to which the foreman answered, in the presence of the jury and before the verdict was recorded, "Yes, sir, distinctly; also for the liability of the firm for the act of the partner." The plaintiff contends that this answer, having the effect of a special finding, *Spurr* v. *Shelburne*, 131 Mass. 429, cures the error now before us. His contention is that these two questions (of the statute of frauds and of ratification) did not arise unless the jury found that the contract which they found was made, was made by word of mouth by Louis T. Block at the June conference between him and the plaintiff. The defendants on the other hand contend that the jury must be taken to have found that the contract was concluded by the letters in March, 1897, because they disbelieved the plaintiff's testimony on the other claim tried. They also point out that the letter of March 19 appeared to have been written by Louis T. Block, and they argue that, so far as this

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letter is concerned, ratification had to be shown. Going beyond this they point out that all that the foreman said as to ratification was that they had considered it and that although they took a vote on the question whether the contract could be performed within a year, and found that it could be, it is not stated that this is what the verdict was rendered on. Enough has been stated to show that these answers cannot be extended by argument to settle a fact beyond that directly covered by them.

Exceptions sustained, and a new trial ordered on the fourth count and on the second items in the third and fifth counts.

JOHN D. WELDON *vs.* D. ANNIE PRESCOTT.
SAME *vs.* HENRY H. GILMAN & others.

Essex. November 3, 1904. — March 1, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Way. License.

In the absence of evidence to the contrary the use of a private way by the public is presumed to be permissive.

One who enters a private way for the purpose of passing through it to his place of business and is called by an abutter on the way into the abutter's place of business and after remaining there a short time enters again upon the way for the purpose of proceeding to his own place of business is a mere licensee, and, if he falls into a hole in the way filled with hot water, he cannot hold the proprietors of the way liable for want of ordinary care.

TWO ACTIONS OF TORT for personal injuries incurred on January 6, 1897, from falling into a hole or excavation filled with hot water, in Phœnix Row in the city of Haverhill, made for the purpose of repairing a leak in a steam pipe extending under Phœnix Row from a building of the defendant in the first case, known as the Hotel Thorndike, to a steam power plant upon the opposite side of Phœnix Row belonging to the same defendant, both of the buildings being occupied by Edward Charlesworth, one of the defendants in the second case. Writs dated January 11, 1899, and January 19, 1901.

In the Superior Court the cases were tried together before

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Stevens, J. At the close of the evidence the judge ruled that upon all the evidence the plaintiff was not entitled to recover, and ordered a verdict for the defendant in the first case and a verdict for all of the defendants in the second case. The plaintiff alleged exceptions.

M. A. Pingree, for the plaintiff.

S. J. Elder, (*F. H. Pearl* with him,) for the defendants Gilman and Sprigg.

J. P. Sweeney, for the defendant Prescott, submitted a brief.

C. H. Poor & E. B. Fuller, for the defendant Charlesworth, also submitted a brief.

HAMMOND, J. Phœnix Row was a private way; and, while there was evidence that it was used to a considerable extent by the public as such, the presumption, in the absence of anything to the contrary, is that it was constructed and maintained for the use of the owners and occupants of the abutting lands and such other persons as had occasion to visit them, and that the use of it by the public was merely permissive. *Moffatt* v. *Kenny*, 174 Mass. 311. In this case there is nothing to control that presumption.

The plaintiff contends that at the time of the accident he was using the street not as one of the public, but as one having business with Shute, a tenant of a portion of the Hotel Thorndike which abutted on the way. We think there is no foundation for that claim. Upon the plaintiff's own uncontradicted testimony he entered the way for the purpose of going to his place of business on Washington Street, and with no intention of stopping either at the Hotel Thorndike or any other building or land abutting on the way. When he arrived about opposite the hotel, Shute "attracted his attention and called him into his (Shute's) place of business." Shute wished to see the plaintiff "upon a matter of business, and after a few moments' conversation, the plaintiff, together with one Whittier, left" the building and entered upon the way "for the purpose of proceeding to the plaintiff's own place of business." After proceeding a short distance with that intention, he fell into the hole and was injured. The purpose of entering the street and passing through it had no reference whatever to his call upon Shute. That call was a mere episode. Before he responded to Shute he was upon

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the street as one of the public, as a mere licensee, and after he left Shute's store he resumed his original position as such. The principles governing the duty which the owner of land or a building abutting on a private way owes to a mere licensee have been so thoroughly discussed in recent cases that it is necessary only to refer to them. This case is distinguishable from cases like *Holmes* v. *Drew*, 151 Mass. 578, and must be classed with cases like *Moffatt* v. *Kenny*, 174 Mass. 311. Under the principles laid down in the latter case and cases therein cited, it is clear that the evidence would not have warranted a verdict for the plaintiff.

This conclusion as to this part of the case renders it unnecessary to consider the other grounds of defence.

Exceptions overruled.

D. L. BILLINGS COMPANY *vs.* CARRIE C. BRAND.

Suffolk. November 9, 1904. — March 1, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Mechanic's Lien.

If the sworn statement of a mechanic's lien is filed under R. L. c. 197, § 6, within thirty days after the petitioner has ceased to labor, and if the last items of labor were performed in good faith under the petitioner's contract, the lien is none the less valid because, before the work named in the last items was done, no work had been done by the petitioner for about thirty-four days and before the last work was done the houses on which the lien is claimed appeared to be completed and were purchased by their present owner without knowledge of any lien. *Whether* there might be an interval of delay so great and unreasonable as to justify the court in holding as matter of law that the lien had been lost was not considered, as in this case the delay was not unreasonable.

MORTON, J. These are petitions to enforce two mechanic's liens for labor and materials furnished by the petitioner in the execution of a contract with one McKay, the owner and builder of two houses in Dorchester, for the plumbing and heating of the houses. The contract was made on or about March 26, 1902, and was for $760 for each house. One of the houses was finished to all appearances on or about July 1, 1902, and the

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other on or before August 8. The respondent purchased the premises of McKay in September, and the papers were passed in the registry of deeds and the deed was recorded on September 11 at 11.26 A. M. Later, on the same day, and also on September 12, the petitioner, at McKay's request, and without any actual knowledge on its part of the conveyance, did certain work on the premises, and thereafter, on September 30, filed a claim for a lien on each lot for the unpaid balance due to it under the contract. The respondent had no knowledge of the work that thus was done, or of the request by McKay, and did not consent thereto or authorize the same. The cases were heard together by a judge of the Superior Court without a jury, and the respondent asked the judge to rule that the liens could not be enforced. The judge refused so to rule and ruled that the petitioner was entitled to maintain its liens. The cases are here on exceptions by the respondent to this ruling and to the refusal to rule as requested. The judge made certain special findings of fact, and, in addition to the facts already stated, found that the only work done within thirty days of the filing of the liens in the registry of deeds was on September 11, 12 and 16; that the work done on September 11 and 12 consisted in connecting a range and doing some work on the pipes of the bath tubs, and took in all about eight hours, and was included in the original contract between the petitioner and McKay; that the respondent "had no knowledge or information, or reason to believe, personally or by her agents, that the contract was not completed prior to September 11, the day on which she took title," and that "the houses appeared to be completed, inside and out, and examinations which had been made by the husband of the respondent, in her behalf, and others had shown nothing apparently unfinished"; that no work was done by the petitioner on the premises between August 8 and September 11, and that during that period the houses also appeared to be finished in all respects. He also found that the work done on September 11 was begun after 11.26 A. M., and that the work done on September 16 was done at the request of the respondent's agent and was not required under the contract between McKay and the petitioner.

There is nothing to show that the work which was done on September 11 and 12, on which the petitioner relies to establish

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its liens, was not done in good faith, and it is expressly found that it was required by the contract between the petitioner and McKay. So far as appears it was done under and by virtue of that contract and in the fulfilment of it. The fact, that the work relied on was not done till after the conveyance of the property to the respondent and the recording of the deed, would not of itself be fatal to the establishment of the liens. It is well settled that a change of ownership before the contract is completed and while the work is going on will not defeat the right to a lien. *Gale* v. *Blaikie*, 126 Mass. 274. *Amidon* v. *Benjamin*, 126 Mass. 276. *Dodge* v. *Hall*, 168 Mass. 435. "The lien continues," it is said, "till all that is called for by the contract has been done." Neither does it affect the validity of the lien that it was not on record, or that the purchaser did not know of it at the time of the conveyance, and has exercised due, or even extraordinary, care to ascertain whether the property is subject to a mechanic's lien. The statement required may be filed at any time within thirty days after the person claiming a lien has "ceased to labor on or to furnish labor or materials for the building or structure," and, in the absence of fraud or conduct amounting to an estoppel, no change in the situation of the parties who have purchased the property which will be caused by his filing a lien will interfere with his right to maintain a petition to enforce it. The respondent contends, however, that the petitioner must be taken, as matter of law, to have ceased to labor or to have ceased to furnish materials for the buildings more than thirty days before the date on which it relies to establish its lien, and that the rulings, therefore, were erroneous. She bases this contention on the fact that the buildings were apparently finished, one on July 1 and the other on August 8, and that nothing was done by the petitioner between those dates and September 11 and 12. But the fact, that, in the progress of the work, more than thirty days may have passed without the petitioner's doing anything on the job would not of itself and as matter of law defeat the liens. The judge found that the work on September 11 and 12 was done pursuant to and under the contract, and it is to be assumed that the judge also found that it was not done colorably to save the liens, but was done in good faith. Without undertaking to say that there might

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not be a case in which the delay was so great and unreasonable as to justify the judge in saying as matter of law that the right to a lien had been lost, we do not see how it can be said in these cases. *Monaghan* v. *Putney*, 161 Mass. 338. *Miller* v. *Wilkinson*, 167 Mass. 136. *McLean* v. *Wiley*, 176 Mass. 233. There was nothing in the nature of an estoppel. The petitioner made no representations or statements to the respondent on which she acted in purchasing the property as was the case in *Hinchley* v. *Greany*, 118 Mass. 595, relied on by the respondent, and it had no actual knowledge that she had bought or contemplated buying the property. We have already said that it is to be assumed that the judge found that the petitioner acted in good faith. In the case of *Hartley* v. *Richardson*, 91 Maine, 424, relied on by the respondent, it was expressly found that the contract had been completed before the work was done on which the complainant relied to establish his lien. In *Flint* v. *Raymond*, 41 Conn. 510, and *Sanford* v. *Frost*, 41 Conn. 617, there was an unexplained delay in one case of six months and in the other of nine months before the work relied on to establish the liens was done. In *Cole* v. *Uhl*, 46 Conn. 296, there was a delay of nearly three months, but the court held that the lien was valid. And such was the result in *Nichols* v. *Culver*, 51 Conn. 177, where there was a delay from some time in September to November 22. The remark, doubtfully made, as to what might have been the result, if, after the work was apparently finished, third parties had acquired an interest in good faith and for a valuable consideration, cannot, of course, affect our decision.

Exceptions overruled.

F. N. Nay & W. N. Swain, for the respondent.

O. Storer, (*C. H. Stebbins* with him,) for the petitioner.

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HANNAH E. SMITH *vs.* HENRY WENZ.

Suffolk. November 11, 14, 1904. — March 1, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Attachment. Officer. Practice, Civil, Costs. *Words,* "Prevailing party."

In determining the validity of an attachment the return of the attaching officer must be taken as true. If not true, the remedy is by an action against the officer for a false return.

If the return of an officer states that he attached certain goods specifically described and at the same time attached other goods which he only identifies as goods of the defendant in a designated building, and further states that thereafter he released from attachment the goods not specifically described, the return discloses a valid attachment.

After an application by a plaintiff for a sale under R. L. c. 167, §§ 82-96, of goods which have been attached, if the attaching officer by direction of the plaintiff, instead of proceeding with the proposed sale, removes and stores the attached goods and continues to hold them, the attachment remains good, as the plaintiff has a right to withdraw his application for a sale.

Where but one judgment is rendered in an action, the prevailing party entitled to costs under R. L. c. 203, § 1, is he for whom the judgment has been given, although in the course of the proceedings he has made certain claims on which he is not allowed to recover and as to which the other party has prevailed. This applies to the taxation of costs for the transmission of papers to this court under R. L. c. 157, § 21. The words "prevailing party" in the last named section have the same meaning as in the statute first named, and do not mean the party in whose favor the questions before this court have been decided unless he also is the party in whose favor the judgment has been entered in the action.

If while an appeal from a taxation of costs by the clerk is pending the attaching officer is allowed to amend his return, *semble* that it is proper for the court to send the case back to the clerk to give him an opportunity to change his taxation on the record as amended, so that an appeal may bring the whole record before the court.

BARKER, J. This cause went to judgment on March 7, 1904, in accordance with the rescript sent down upon the decision reported in 185 Mass. 229. Thereafter steps were taken to tax the plaintiff's costs, resulting in a taxation in the clerk's office in the sum of $260.05, which upon appeal was affirmed by a judge of the Superior Court, and from this decision an appeal was taken by the defendant to this court.

The items which the defendant contends are embraced wrongfully in the taxation are of two classes, first, those taxed for officer's fees for service of the writ by attachment of the defend-

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ant's goods, and second, those for entry fee, copies and briefs, when the case was here upon the report upon which the decision in 185 Mass. was made.

1. The defendant contends that the officer's fees for service by attachment were improperly allowed in the taxation because, first, there never was a valid attachment of goods upon the writ, and next, because if there at first was a good attachment it was made void and the officer rendered a trespasser *ab initio* because the plaintiff having made application to have the goods sold under the provisions of R. L. c. 167, §§ 82 *et seq.*, the proposed sale thereafter was abandoned and the goods were stored and kept.

The validity of the attachment is to be decided upon this appeal by the statements of the record, and the officer's return of service is to be taken as true. If false in fact the defendant's remedy is by an action against him for a false return. *Slayton* v. *Chester*, 4 Mass. 478. *Bean* v. *Parker*, 17 Mass. 591, 601. *Whithead* v. *Keyes*, 3 Allen, 495. *McGough* v. *Wellington*, 6 Allen, 505. This doctrine the defendant concedes, but urges that the return contains no sufficient description of the property said to be attached, and that the attachment must be held void for that reason. The return recites that on February 7, 1903, the officer by virtue of the writ "attached certain goods and chattels in building numbered 9 and 11 Harcourt St., Boston, as the property of the within named defendant Henry Wenz and placed a keeper in charge of the same." It further states that a summons was served on the same day, and that on February 12, 1903, the plaintiff having made application to have the goods sold the officer caused a schedule of "said property to be taken for said purpose," and that on February 21, 1903, by direction of the plaintiff's attorney he moved and stored as much of the attached property as is described in the schedule, and dissolved his attachment on all the other property attached except the sum of $36 in currency. The schedule referred to in the return is annexed to the writ and is of ninety-five bags of cocoa beans, each bag being described by numbers or marks and weight.

The defendant's argument is that he had at the building mentioned a candy factory in which was machinery, apparatus and much other personal property besides that mentioned in the schedule; that all this personalty was attached if any, and that the

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whole attachment must be held void because a sufficient description of the whole property is not given in the return.

We do not so think. In *Baxter* v. *Rice*, 21 Pick. 197, where the return was merely that the officer had "attached a store of goods, the property of the" defendants, the action being trespass against the officer and his return not conclusive, the objection being taken that the return contained no sufficient description of the goods, the court said generally that it was important "that a good degree of exactness and particularity should be observed" to show the identity of the goods, but that "from the nature of the subject, it is difficult to lay down a precise general rule." No opinion was expressed upon the sufficiency of the return in *Baxter* v. *Rice*, because the return might still be amended and the cause was continued for that purpose. In *Baxter* v. *Rice*, the return stated the property as "a store of goods, the property of" the defendants. In the present case the return goes much further. It identifies the goods as being in a designated building, and further states that they are placed in charge of a keeper. From its statements of the officer's acts subsequent to the time when the attachment was first made the return makes it certain that the ninety-five bags of cocoa beans described in the schedule were articles comprised in the goods originally attached and placed in charge of the keeper. So far as they are concerned the return itself gives of them an exact and particular description.

In this proceeding the return must be taken to be true, and therefore we are to consider that while it states that the officer attached certain specifically described goods he attached also at the same time and place certain other goods of which he gives no detailed description, and no identification save that they were goods of the defendant in a designated building, and that thereafter the officer released from attachment the goods not specifically and particularly described. To hold that such a return made the whole attachment void, would be to impose upon every officer making an attachment of goods or chattels the duty of making at once a detailed schedule of the property attached. Such never has been the practice. Such a requirement would entail great and useless expense, and would be oppressive upon the defendant if not upon both parties. We are of opinion that the return discloses a valid attachment.

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Nor do we think the attachment became void because at the direction of the plaintiff the officer, instead of proceeding with the proposed sale on mesne process, moved and stored the property and continued to hold it. The statutory provisions are found, in R. L. c. 167, §§ 82–96. Unless both debtor and creditor unite in a written consent, a sale can be made only after a determination on the part of appraisers that the property is liable to perish or waste, or cannot be kept without great and disproportionate expense. R. L. c. 167, § 87. It is true that the statute says that the property "shall . . . be examined, appraised and sold" upon the application of either of the parties interested to the attaching officer. The defendant's argument is that application having been made to the officer by the plaintiff the officer must then proceed with the statutory steps looking to a sale, and that his omission so to do makes him a trespasser *ab initio* and the attachment void. But either party having a right to make application for a sale the defendant could suffer no harm by the plaintiff's withdrawal of his application. In many cases an attachment covers both goods liable to sale and goods not so liable. If upon consideration, after having made application for a sale under the statute, an attaching creditor should find that he had secured a lien upon enough goods which were not of a character requiring or authorizing a sale upon mesne process, it would be monstrous and oppressive if he could not withdraw his application without wholly dissolving the attachment. No one can be damaged by such a withdrawal, for if the debtor desires a sale he can have it upon his own application. The statutes relating to attachment upon mesne process are to be read in the light of custom and of common practice, and we think it would be a surprise to the profession to construe the statute not to allow a party who has applied for a sale to withdraw his application upon finding that a sale was unnecessary. None of the cases cited by the defendant were cases in which the party asking for a sale had subsequently withdrawn his application. See *Crocker* v. *Baker*, 18 Pick. 407; *McGough* v. *Wellington*, 6 Allen, 505; *Pollard* v. *Baker*, 101 Mass. 259; *Wheeler* v. *Raymond*, 130 Mass. 247.

2. The general statutory provision for costs is that "In civil actions the prevailing party shall recover his costs, except as

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otherwise provided." R. L. c. 203, § 1. Where but one judgment is rendered in the action the prevailing party is the one in whose favor that judgment is entered. *Ross* v. *Harper*, 99 Mass. 175, 177. The only judgment entered in the present case was in favor of the plaintiff, and therefore he was the "prevailing party" within the meaning of R. L. c. 203, § 1, although in the course of the proceedings he had made certain claims upon which he was held not entitled to recover, and as to which, though not generally in the action, the defendant prevailed. Whether the defendant is entitled to costs under the provisions of R. L. c. 203, § 10, providing that if a verdict is rendered for the plaintiff upon one or more counts and for the defendant upon any other or others each party shall recover costs for the travel and attendance of witnesses and other expenses incurred for evidence at the trial is not now in question. Nor do the provisions of R. L. c. 157, § 21, constitute an exception to the general rule laid down in R. L. c. 203, § 1. That section provides that the expense of copies for the full court and of their transmission "shall be taxed in the bill of costs of the prevailing party, if he has paid it." The words "prevailing party" are here used in the same sense as in R. L. c. 203, § 1, and do not mean the party in whose favor the questions carried to the full court are decided unless he is the party in whose favor a judgment is entered in the action. See *Ross* v. *Harper*, *ubi supra*. Costs in applications such as those which were considered in *Childs* v. *New Haven & Northampton Co.* 135 Mass. 570, depend on special provisions of statute, and are not within the general laws regulating costs in civil actions. *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 116, 117. The case of *Shattuck* v. *Woods*, 3 Pick. 267, was decided in 1825, under the provisions of St. 1784, c. 28, § 9, that "in all actions . . . the party prevailing shall be entitled to his legal costs against the other", and was a case in which there were two counts, with a verdict on one for the plaintiff and on the other for the defendant, and each party therefore was a prevailing party and was held entitled to recover his costs. But a new provision was introduced in the Revised Statutes, similar to that now found in R. L. c. 203, § 10, limiting the costs which the defendant can recover in such an action to certain expenses for procuring evi-

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dence. See Rev. Sts. c. 121, § 16, and commissioners' notes to same, p. 282.

3. After one taxation had been made in the clerk's office from which both parties appealed to the court, pending those appeals the officer was allowed to amend his return, and thereupon the matter was referred back by the court for further hearing, and the clerk changed his taxation. The defendant contends here that the reference back to the clerk was wrong, and that the judge should have decided the questions raised by the appeals as the record stood when they were taken. We think the practice was right. The amendment allowed changed the record on which the taxation was to be made, and to have decided the appeal would have been to pass upon a moot question. However this may have been no exception appears to have been taken at the time to the course pursued by the court, and the question is not open.

Taxation of costs affirmed with costs of the appeal.

S. C. Bennett, for the defendant.

G. W. Anderson, for the plaintiff.

EDWIN S. WOODBURY & another, trustees, *vs.* SPARRELL PRINT & another.

Suffolk. December 1, 1904. — March 1, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Fraud, As to creditors. *Equity Jurisdiction*, To reach and apply property fraudulently conveyed. *Landlord and Tenant*. *Equity Pleading and Practice*, Bill, Variance, Master's report. *Words*, "Debt."

A conveyance fraudulent under St. 13 Eliz. c. 5, may be avoided as well by subsequent as by existing creditors.

A claim for loss of rent, under a covenant in a lease that in case the lease is terminated by the lessor for breach of covenant the lessee shall be liable for all loss and damage of the lessor from the premises remaining unleased for the remainder of the term, is a debt within the meaning of R. L. c. 159, § 3, cl. 8, giving equity jurisdiction to reach and apply in payment of a debt property of the debtor fraudulently conveyed.

In a bill in equity to reach and apply property, alleged to have been conveyed fraud-

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ulently by the defendant, in payment of a debt to the plaintiff for rent and for loss of rent under a covenant in a lease to pay for such loss if the premises remain unleased during the remainder of the term after the lessor has terminated the lease for breach of covenant, an averment that the defendant owes the plaintiff a sum named for accrued instalments of rent and loss of rent according to an account annexed, which contains a charge of an item on the first day of each month with the words "instalment due under lease", naming the amount of the monthly rent, is not bad for want of sufficient certainty in not naming the date of the termination of the lease and distinguishing the items for rent from those for loss of rent, if a master has found that the loss of rent from month to month was the same in amount as the rent itself before the termination of the lease, the date of the termination being a matter within the defendant's knowledge.

In a suit in equity founded on the covenants of a lease, there is no variance if a lease is admitted in evidence which corresponds with that alleged in the bill but in addition has written upon it a guaranty of payment of the rent signed by a third party and also an agreement signed by the plaintiff to put into the leased premises two skylights and a water closet and to supply water service from the city of Boston, if these have been found by a master to be additional instruments.

Whether an exception to a master's report because the master did not make certain rulings can be considered by this court if the master's report does not show that any of the rulings were requested except so far as this can be inferred from the master's statement that objections were filed on the ground that the rulings were not made, *quære*.

A suit in equity to reach and apply property, alleged to have been conveyed fraudulently by the defendant, in payment of a debt to the plaintiff for loss of rent, under a covenant in a lease to pay for such loss if the premises remain unleased during the remainder of the term after the lessor has terminated the lease for breach of covenant, or if the premises are let after such termination for a rent less than that reserved in the lease, is brought prematurely if the bill is filed while the premises continue to remain unleased and before the end of the term of the lease, as the amount of the loss cannot be determined at that time and therefore is not payable.

KNOWLTON, C. J. This is a bill in equity brought under the R. L. c. 159, § 8, cl. 8, to reach and apply in payment of a debt property alleged to have been fraudulently conveyed by the debtor, with intent to defeat, delay or defraud his creditors. The defendants filed a demurrer, which was sustained in part and overruled in part, and the case comes before us on the defendants' appeal from the order overruling a part of the demurrer, and from a final decree for the plaintiffs which overruled exceptions taken by the defendants at the hearing before the master.

The plaintiffs' principal claim is for rent accruing under a lease for a term of years, and the defendants' first ground of demurrer is that the statute does not apply to a case in which

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the debt accrued after the conveyance was made. But it is familiar law that a conveyance fraudulent under the St. of 13 Eliz. c. 5, as against existing creditors at the time of its delivery, also may be avoided by subsequent creditors. *Parkman* v. *Welch*, 19 Pick. 231. *Livermore* v. *Boutelle*, 11 Gray, 217. On the allegations of the bill, a demurrer on this ground cannot be sustained.

One of the provisions of the lease on which the plaintiffs' claim is founded is as follows: "And, in case of such determination, [of the lease by the lessor for a breach of the covenants,] the lessee shall be liable to the lessor for all loss and damage sustained by the lessors on account of the premises remaining unleased, or being let for the remainder of the term for a less rent than that herein reserved." The second ground of demurrer is that the claim in the bill is for "rent and loss of rent." This stipulation is an agreement, which is binding as a contract in the nature of a covenant, to pay the lessors the amount of their loss or damage on account of the premises remaining unleased after a determination of the lease for a breach of the covenants. It also includes an agreement to pay for the loss, if any, on account of the premises being let at a less rent for the remainder of the term. The liability thus created is as much contractual as the obligation under the covenant to pay the rent monthly. The only difference is that the amount is unliquidated; and this brings us to the question whether the word "debt" in the R. L. c. 159, § 3, cl. 8, which is used also in the same way in clause seven of this section, is to be given a narrow, technical meaning, or is used in a broad sense to include ordinary obligations founded on contract, when the amount due has not been definitely ascertained. We are of opinion that in this statute it is used in its broad sense. There is no reason why a liability founded on a judgment, or a formal covenant, or an instrument under seal, should in legal effect be any different, in regard to a fraudulent conveyance by the debtor, from other kinds of contractual liability, even if the amount to be paid is unliquidated. In *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 455, Chief Justice Shaw said, in reference to a statute which imposed upon stockholders of corporations a liability for its debts: "Though a question was made, whether such a claim

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for unliquidated damages is a debt, within the meaning of the statute, we do not think it admits of a reasonable doubt, that all such claims for damages were intended to be included in the term 'debts.'" So in *Gray* v. *Bennett*, 3 Met. 522, 526, the court said, in construing an act for the relief of insolvent debtors, that "the word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, but also obligations arising under simple contract, to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise." See also *Atlas Bank* v. *Nahant Bank*, 3 Met. 581, 582; *Wyman* v. *American Powder Co.* 8 Cush. 168, 182; *Stratton* v. *Hernon*, 154 Mass. 310; *Nichols* v. *Eaton*, 91 U. S. 716, 725; *Frazer* v. *Tunis*, 1 Binn. (Penn.) 254; *New Haven Steam Saw Mill Co.* v. *Fowler*, 28 Conn. 103, 108; *Haynes* v. *Brown*, 36 N. H. 545; *Fisher* v. *Consequa*, 2 Wash. C. C. 382, 385; *Stiff* v. *Fisher*, 2 Tex. Civ. App. 346. We are of opinion that a claim for loss of rent, under the agreement, is a debt within the meaning of this statute.

The third ground of demurrer is that the defendants' claim is not stated with sufficient certainty. The averment is that the defendants "owe them for accrued instalments of rent and for loss of rent under the covenants of said lease, the sum of $1,762.50 . . . according to the account hereto annexed." The account annexed contains a charge of an item on the first day of each month in the words, "Instalment due under lease, $212.50." Upon the findings of the master, the loss of rent from month to month after the determination of the lease was the same in amount as the rent itself before its determination. While the averment would have been complete in its history if it had stated the time when the lease was determined and the covenant to pay the rent gave place for the future to a contract to pay for the loss of rent, this fact was then within the defendants' knowledge, and the general description of the debt for accrued rent was correct without it. The demurrer did not particularly refer to this, but the third ground of it was in general terms, "because the plaintiffs' claim is not stated with that degree of certainty with which the defendants are entitled." Looking to the claim for rent as distinguished from that for loss of rent, we are of opinion that this ground of demurrer was rightly

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ruled to be insufficient. The other grounds are not now insisted upon.

The first exception is that the master admitted the lease in evidence against the defendants' objection that there was a variance between it and the copy annexed to the bill. This objection was because, on the same paper, following the executed lease, was written a guaranty of payment of the rent, signed by another party, and also an agreement, signed by the lessors, to put into the leased premises two skylights and a water closet, and to supply water service from the city of Boston. These were found by the master to be additional instruments, and we see no error in this conclusion.

The fifth, sixth and seventh exceptions are, that the master did not distinguish in his findings between the amounts due for rent and those due for loss of rent. He did find that, on April 4, 1903, the plaintiffs determined the lease and took possession. He also found that they immediately made a reasonable effort to relet the premises, but without success up to the time of filing the bill. He found that the first three items of the account were for rent due before the time of taking possession, and that all the items except that for water are due, they being severally charged as "Instalment due under lease." He reports that he does not consider it material whether the amounts found should be described as rent or by some other name.

The tenth exception is because the master did not give certain rulings requested, one of which was in substance that the claim for loss did not accrue until after the expiration of the lease and that there was no such debt due when the bill was filed. The master's report does not show that any of these rulings were requested, unless it appears inferentially from his statement that objections were filed on the ground that they were not given. This exception is informally taken, and if it stood alone, it would be questionable whether it should be considered. See *O'Brien* v. *Keefe*, 175 Mass. 274. But the former exceptions, without this, fairly raise a question as to the correctness of the allowance by the master for instalments due under the lease after its determination. We must, therefore, consider the meaning of the stipulation referred to.

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The lessee is to be liable for — that is he agrees to pay — the amount of loss or damage sustained from either or both of two causes, namely, "the premises remaining unleased", and their "being let for the remainder of the term for a less rent" than that reserved. The question is, When is the lessee to pay the sums referred to? The liability is independent of the obligation under the covenant to pay the rent during the term of the lease. No rent accrues after the lease is determined. The lessor has the premises, and presumably uses them or lets them to another tenant. They are liable, however, to remain unleased and unused for a time, but ordinarily not for a very long time. The lessee agrees to pay for the loss that may come from this liability. He is to pay it once for all. He does not agree to pay it in instalments. Much less does he agree to pay rent as rent, according to the covenants, for the term previously ended by the lessor's entry. We can discover nothing to show that he is to make this payment until the premises cease to remain unleased. The liability rests upon the agreement contained in the lease, and as to this there is no breach of contract on the part of the lessee, until the time for payment arrives.

In this case the premises remained unleased until after the commencement of the suit, and the defendants had not then become liable for this loss. It follows that the decree must be reversed, and the exceptions touching this subject be sustained.

The matters referred to in the remaining exceptions need not be considered, further than to say that they disclose no error of law.

The omission of the judge to hear and determine the question of fraud, we understand to have been in accordance with the desire of the parties. This is indicated by the filing by the defendants of a bond, with a surety, to pay the amount, if any, that should be found due, and by the reference to the master of nothing but the question what was due under the lease.

There must be a decree for the plaintiffs for the amount due for rent, according to the master's report, at the time of the determination of the lease.

So ordered.

G. C. Abbott, for the defendants.

W. H. Brown, for the plaintiffs.

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SAMUEL RAPSON *vs.* GEORGE E. LEIGHTON & another.

Suffolk. January 9, 1905. — March 1, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Employer's liability. *Evidence*, Competency.

If, while plasterers are preparing to erect a temporary staging to use in their work, a superintendent interferes and orders them for the purpose of supporting the temporary staging at one end to use a certain ledger board, which obviously is defective and unfit, but which the superintendent fails to inspect or to have inspected, and if the plasterers obeying the superintendent use the ledger board, and later another plasterer who did not assist in erecting the staging is injured by its giving way on account of the breaking of the defective ledger board, there is evidence on which the employer may be found to be liable to the plasterer for the injury caused by the negligence of the superintendent, although the same ledger board has been used for two weeks previous to the accident to support a temporary staging for carpenters and lathers without breaking.

Evidence naturally relevant, which is incompetent by reason of a rule of law, such as a witness's opinion or his conclusion of fact, if it is admitted without objection becomes a part of the case and may be considered by the jury and by this court, and it does not matter that the trial judge has certified that if the evidence had been called to his attention he would have excluded it and that he did not consider it in making his ruling on the case.

TORT by a plasterer against his employer for injuries received on December 26, 1899, from the fall of a staging on which the plaintiff was standing while at work, causing the plaintiff to fall through a hole in the floor upon a pile of brick and rubbish in the cellar of the building in which the work was being done. Writ dated February 17, 1900.

In the Superior Court the case was tried before *Gaskill*, J. The following statement of the case is taken from the opinion of the court:

The plaintiff in this action was engaged by the defendants to work as a plasterer on a building which they had under construction. He was hired at half past eleven on the morning of the day of the accident, and immediately upon being employed was ordered to go upon a staging which was then in position. The staging was some six or seven feet above the level of the floor below and over a long hole, running the length of the building, left in the floor to give light. The staging consisted

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of planks, which seem to have been laid on the main staging at one end (there was some conflict on this point but it is not material) and at the other end rested on a ledger board nailed at one end to the side of the building and at the other end to an upright on the other side of the hole in the floor. This ledger board was five or six feet long, six inches wide and one inch thick. After the plaintiff had worked on this staging about an hour and a half the ledger board broke, and the plaintiff was thrown through the hole in the floor upon a pile of bricks and rubbish in the basement, suffering the injuries here complained of.

It appeared from the plaintiff's evidence that this staging had been built by employees of the defendants, and had been used for some two weeks before the accident by carpenters and lathers. On the morning of the day of the accident all the planks which previously had rested on this ledger board were taken away. The preparation of the stagings for the plasterers was left to one Lane and one Silva, both plasterers in the employ of the defendants. On the morning in question Silva was about to knock down the ledger board with a view to covering the hole in the floor with boards and to placing on these boards horses on which he intended to lay one end of the planks which were to constitute the staging for the plasterers, when he was stopped by one Beady or Beattie. Beady (for convenience he will be called Beady although he was called by both names by the plaintiff's witnesses) could have been found to be a superintendent in charge of the whole work of construction.

Lane testified that Beady "told Mr. Silva he didn't think it was necessary to knock it down. He said other men had worked on it, and he didn't see why it wasn't good enough for us; if it was taken down, it would cause us considerable trouble to floor the place over and rig it with our staging." Silva testified that Beady said: "You cannot take that down (meaning the ledger board). I want to use it. My men have worked on it; the lathers have worked on it; why isn't it fit for one or two plasterers to work on it?" Silva further testified that the reason he did not take down the ledger board was this order of Beady's. It appeared that Lane and Silva then placed planks, as already stated, resting at one end on the main staging and at the other end on the ledger board. Silva further testi-

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fied that he examined the ledger board after the accident and found a knot in it about an inch and a half square; that the ledger board "broke right on the knot"; and that "The knot was the cause of the ledger to break." This was the last answer of Silva on his direct examination.

On this evidence the presiding judge directed the jury to return a verdict for the defendants, and the case is here on an exception to that ruling. The certificate of the presiding judge allowing the bill of exceptions is in these words: "Allowed, subject to following statement: The answer contained in last sentence of witness Silva's direct examination was not called to my attention at the time of trial, or before I ordered verdict, and not until the allowance of exceptions. If it had been called to my attention at the time of trial, I should have excluded it as not responsive and not competent, the witness not being an expert."

S. A. Fuller, for the plaintiff.

J. Lowell & J. A. Lowell, for the defendants.

LORING, J. [After the foregoing statement of the case.] We are of opinion that this exception must be sustained.

An employer can leave to his employees the erection of stagings which are used temporarily in the course of work. If he elects to do so and furnishes them with proper materials, and is not negligent in the selection of his employees, he is not liable. *Thompson* v. *Worcester*, 184 Mass. 354. But in the case at bar Beady, who could be found to be a superintendent, interfered and directed the employees to use the ledger board, without inspecting it to see if it was safe. This could be found to have been an act of superintendence and so within *Murphy* v. *New York, New Haven, & Hartford Railroad*, *ante*, 18, and not within *Shea* v. *Wellington*, 163 Mass. 364, and *Whittaker* v. *Bent*, 167 Mass. 588.

If the act could have been found to be a negligent act the defendants are liable. To direct an employee to use a ledger board which is in fact obviously defective and unfit, without inspecting it or having it inspected to see if it is fit, is as much an act of negligence as to inspect it without discovering the defect. What raises a doubt in the case at bar is that the plaintiff's witnesses testified that the ledger board which broke had

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been in use for two weeks to support a staging used by carpenters and lathers which consisted of some boards or planks which Lane testified "We stripped and substituted our planks for them" on the morning of the accident in question. Why the ledger board broke under the use it was put to by the plasterers after standing two weeks' use by carpenters and lathers does not appear. Neither does it appear whether the boards which were stripped off were lighter than those put on, or whether more weight was on the staging when it was used by the plasterers. We do not think that the two weeks' previous use without breaking was sufficient under this state of the evidence to control what was or might be found to be otherwise an act of negligence.

The certificate of the presiding judge as to the last answer of the witness Silva does not take that testimony out of the case. Incompetent evidence admitted without objection becomes evidence. *Damon* v. *Carrol*, 163 Mass. 404. *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93. *Allen* v. *Fuller*, 182 Mass. 202. *Brightman* v. *Buffington*, 184 Mass. 401. The ruling must stand on the evidence as it stood when the ruling was made. It is of no consequence that the judge now certifies that if a certain piece of evidence had been called to his attention he would have excluded it, nor that he did not have that piece of evidence in mind when he made his ruling.

But this is not of consequence. Lane testified that "the ledger board broke right on the knot," and the jury were warranted in finding that the knot was the cause of the ledger board's breaking.

Exceptions sustained.

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COMMONWEALTH *vs.* INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY.

Bristol. January 16, 1905. — March 1, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Constitutional Law, Equal protection of the laws, Taking property without due process of law, Police power. *School.*

R. L. c. 112, § 72, requiring street railway companies to carry pupils of the public schools to and from school at rates not exceeding half the regular fare charged for the transportation of other passengers between the same points, is constitutional, although by § 1 of the same chapter it does not apply to the Boston Elevated Railway Company, and although the privilege extends only to pupils of the public schools, this being a police regulation in the interest of education, and it being assumed that the Legislature was satisfied that no railway company would suffer loss from carrying school children at half the regular fare.

COMPLAINT, received and sworn to in the First District Court of Bristol on December 12, 1903, charging the defendant, operating a street railway at Attleborough, with refusing to sell tickets for the transportation of pupils of the public schools at the special rates required by R. L. c. 112, § 72, contrary to the provisions of that section.

On appeal to the Superior Court the case was heard by *White*, J. The defendant admitted the fact charged, but contended that the statute was unconstitutional and void, in that it denied to the defendant the equal protection of the laws, and deprived the defendant of its property without just compensation and without due process of law. The defendant made certain offers of proof, and requested rulings of law in accordance with its contentions and that the judge should order a verdict of not guilty. The judge rejected the offers of proof and denied the requests for rulings, and directed a verdict of guilty. The defendant alleged exceptions.

E. W. Burdett, (*J. H. Knight* with him,) for the defendant.

J. M. Swift, District Attorney, for the Commonwealth.

KNOWLTON, C. J. The only question in this case is whether the R. L. c. 112, § 72, is constitutional. This statute requires street railway companies to carry pupils of the public schools,

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in their regular course going from their homes to the schools and returning therefrom, at rates not exceeding half the regular fare charged by the company for the transportation of other passengers between the same points. The defendant offered evidence tending to show that one half the regular fare charged for passengers on its lines, within the limits of the towns in which it operates, is less than the average cost per passenger of their transportation. It offered to prove that its business is conducted economically. It also wished to show that one street railway company which is exempted from the operation of this statute transports nearly one half of all the passengers carried on street railways in this Commonwealth, and receives nearly one half of all the income received for the transportation of passengers on these street railways. This evidence was excluded.

The defendant contended and asked the judge to rule that the statute is repugnant to the fourteenth amendment of the Constitution of the United States, in that it does not apply to all the street railway companies in the Commonwealth, and does not apply to all persons using street railways, nor even to all pupils using street railways, but only to pupils of the public schools. It also asked for a ruling that the statute deprives it of its property without just compensation and without due process of law, and is repugnant to the tenth article of the Declaration of Rights of Massachusetts, and to the fifth and fourteenth articles of amendment to the Constitution of the United States. Exceptions were taken to the refusal of the judge to make these rulings.

The defendant does not question the right of the Legislature reasonably to regulate its rates of fare. While this right is well established, it can be exercised only in such a way as will not deprive the company of its property without compensation or without due process of law. Action of a Legislature in this particular is subject to the revisory power of the courts. *Reagan* v. *Farmers' Loan & Trust Co.* 154 U. S. 362, 397, 399. *Smyth* v. *Ames*, 169 U. S. 466, 526. *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, 91. If the effect of this statute were to compel the defendant to conduct its business at a loss, we should say unhesitatingly that the law was unconstitutional. But the section places no limitation upon the rates that may be

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charged generally. It only fixes, in connection with the regular rate, the relative fare to be charged for carrying pupils to and from the public schools. There is nothing in it to prevent the defendant from making its regular fare for passengers within the limits of a town six or seven cents instead of five cents, charging pupils in the public schools one half of the price so established.

The R. L. c. 112, § 1, leaves unchanged the provisions of law in force at the time of its enactment which were applicable to the Boston Elevated Railway Company. That company is thereby exempted from these provisions as to pupils of the public schools. It is contended that this makes a discrimination which deprives the defendant of the equal protection of the laws. The constitutional principle invoked in this contention does not require that the same laws shall be enacted for all street railway companies in different parts of a State. *Attorney General* v. *Old Colony Railroad*, 160 Mass. 62, 89. *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578. *Tilley* v. *Savannah, Florida & Western Railroad*, 5 Fed. Rep. 641, 661. *Ames* v. *Union Pacific Railway*, 64 Fed. Rep. 165, 171. The situation of the lines of the Boston Elevated Railway Company, in the midst of a dense population, is so different from that of other lines in the State, and their fitness for use by children in going to and from the public schools, might be found by the Legislature to be so unlike that of street railways generally in the State, as properly to call for an exemption from the law established for others. We cannot say that the Legislature had no power to make this distinction, founded on differences in conditions.

The most important and difficult question in the case is whether there is constitutional justification for a discrimination between pupils of the public schools and other persons. If this were an absolute and arbitrary selection of a class, independently of good reasons for making a distinction, the provision would be unconstitutional and void. As was said by Mr. Justice Brewer in *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 159: "Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this." The subject of compelling

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a railroad company to make an exception as to its rates, in favor of a certain class of persons, was considered elaborately in *Lake Shore & Michigan Southern Railway* v. *Smith*, 173 U. S. 684, and it was held that ordinarily the Legislature has not power to compel such action. The subject is also referred to in *Wisconsin, Minnesota & Pacific Railroad* v. *Jacobson*, 179 U. S. 287, 301. But if the difference is founded on a reasonable distinction in principle, such discrimination does not deny the equal protection of the laws. *Opinion of the Justices*, 166 Mass. 589. *Pacific Express Co.* v. *Seibert*, 142 U. S. 339. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92.

In this case the selection of a class is not entirely arbitrary. The education of children throughout the Commonwealth is a subject for legislation which has occupied the thoughts of our lawmakers from early times. The duty of legislatures and magistrates to be diligent in the promotion of education, among all the people, is specially declared in c. 5, § 2, of the Constitution of the Commonwealth. Compulsory attendance of children in the schools is provided for by our laws. R. L. c. 44, § 1. Money may be appropriated by cities and towns for conveying pupils to and from the public schools. R. L. c. 25, § 15. It cannot be said that the Legislature may not concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles. R. L. c. 42, § 35. So far as this statute merely gives help to these pupils in connection with their acquisition of knowledge in the schools, it is justified. As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations, which they must bear themselves, or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school

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children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination.

We are, therefore, brought to the inquiry whether it was possible for the Legislature to conclude that this provision would entail no loss upon the street railway companies. Was it not possible for legislators to decide that pupils, in most cases, go to and from the public schools at hours when the cars are not in use by persons going to and from their work, or by many persons; that the pupils generally are of such age and size as not individually to occupy nearly so much space as other passengers; that the difference between full fare and half fare is of such importance to the parents of many of these pupils, that the number who would ride at the half rate, would be nearly if not quite twice as many as at the regular rate; and that for these and other reasons, railway companies would suffer no loss from carrying the children at half the regular fare? Unless we can say as matter of law that such a view would be untenable, we cannot hold that the statute is unconstitutional. Nothing less than a certainty that the provision would cause loss to the railway companies, or to some of them, would enable us to hold that the Legislature was powerless to make the requirement. The question is difficult and doubtful. It involves the consideration of facts which primarily are for the lawmaking power. All presumptions are in favor of the validity of legislation. The evidence offered by the defendant had no tendency to show that it would suffer loss by carrying these pupils at half the regular rates. For all that appears, it would be in better financial condition at the end of a year, if it carried the children in compliance with the statute, than if it did not carry any of them. We hesitate to say that our lawmakers could not pass the act as one which would put no financial burden upon anybody.

It has come to our notice in former cases, that before this statute was passed, similar conditions were sometimes imposed by towns in connection with grants of locations, and were accepted with seeming willingness by the railway corporations.

We are of opinion that the law is constitutional.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN MACK & others.

Suffolk. November 30, 1904. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Boxing Match or Sparring Exhibition. Public Shows.

Under R. L. c. 207, § 12, making it a criminal offence to engage in, give or promote a public boxing match or sparring exhibition, if it appears that the public are invited and admitted to such a match or exhibition as to other places of amusement on tickets entitling them to seats varying in location according to the price paid, the exhibition may be found to be public, although the building is leased to a club and each applicant for a ticket is required to sign a request to become a member of the club, it being a question for the jury whether the machinery of the club is a mere sham and fraudulent contrivance to evade the law.

HAMMOND, J. This was a complaint under R. L. c. 102, §§ 172, 173, and c. 207, § 12, in which the defendants were charged in substance with setting up and promoting a public boxing match and sparring exhibition. The exhibition was held on the evening of August 20, 1903, in a large building formerly a riding academy. "In the centre a ring was roped off upon a raised platform; upon the sides were seats for spectators to the number of at least fifteen hundred." On the occasion in question there were present about one thousand spectators. There were engaged in the match principals, seconds and attendants. At the trial the defendants did not contend that the match was not a boxing match and sparring exhibition, but they contended that the exhibition was not public within the meaning of the statute. The evidence bearing upon this question may be summed up as follows.

The building was leased by a club regularly chartered and organized under the laws of this Commonwealth, for "the purpose of promoting social intercourse among its members, and the encouragement of athletic sports and exercises." By its by-laws the membership was limited to four thousand. The exhibition in question was held under the management of this club. One of the by-laws authorized the defendant Sanborn, one of its board of directors, to receive and act upon all applications for

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membership, and to admit any applicant, "reserving the right, however, to the full board to reject any person so admitted if the board . . . considered him an undesirable person to be a member of the club.

"It was Sanborn's custom on admitting an applicant to membership to furnish him a ticket entitling him to a seat on receipt of a sum of money, the amount of which depended upon the location of the seat. A large number of blank forms for application for membership were kept convenient to the ticket office.

"Upon this occasion, as upon others, Sanborn admitted to membership in the club and to the exhibition aforesaid a large number of persons, giving each of them a receipt for one, two, or three dollars, with a ticket entitling him to a seat, the amount paid depending as aforesaid upon the location of the seat. Upon this, as on previous occasions, Sanborn rejected no one who was not drunk or disorderly. Persons were admitted as freely, after conforming to the above requirement, as they would be to a public theatre or other entertainment to which admission is obtained by the payment of money. Persons so admitted to membership afterwards received a card entitling them to the use of the gymnasium apparatus and baths in said building for the term of one year. The building, it further appeared in evidence, was open from 10 A. M. to 10 P. M. for the members of the club, and the exhibition hall had been used for concerts and wrestling matches for club members without assessment. To witness another boxing exhibition, however, it was necessary for such member to pay another so-called assessment, the amount of which would be determined in the manner aforesaid, and fixed by vote of the board of directors.

"All original applications were kept and were produced in court, and also an alphabetical file showing the names and addresses of all members to whom notices were sent of this and other meetings."

At the close of the evidence the presiding judge stated that he should instruct the jury that "a public boxing match or a sparring exhibition was where the public generally were admitted for the purpose of witnessing the exhibition, and if this was such an exhibition, where all persons were admitted in the same way as to theatres and other public places of amusement,

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it would constitute a public exhibition, and it might not be very important or material whether the applicants for tickets were required to sign a request to become a member of the club, or to walk twice around the building, provided it was understood that all such applicants so signing or walking would be allowed to purchase tickets and witness the exhibition."

Whereupon the defendants said that if such were to be the instructions they would consent to a verdict of guilty, which was taken; and the case is reported to this court upon the question "whether such ruling was warranted upon the foregoing evidence. If the ruling was correct, the verdict is to stand."

We understand the report to present the question whether the ruling which the judge stated he should give, and which under the circumstances must be regarded as given, was correct, so far as applicable to the case; and whether upon such a ruling the evidence warranted a conviction that this was a public exhibition within the meaning of the statute upon which the complaint is based.

So far as material to this case it may be said in a general way that an exhibition or amusement is public when the public are invited and admitted to it upon complying with the terms of the admission. The most usual condition is the payment of a small sum of money, but the imposition of other terms not prohibitive but reasonable in themselves and appropriate to the peculiar kind of exhibition, does not necessarily annul the public feature. In many cases one of the conditions may be that the applicant shall have attained a certain age, shall be decently clothed and not under the influence of intoxicating liquor. In the case of a public ball there may be conditions that every man shall be attired in a dress suit and every woman in the colonial costume of the seventeenth century. Nor does the fact that, for the money to be paid something more than the mere right to witness the exhibition is offered as an inducement to procure attendance, as for instance where some souvenir in the shape of a picture of a favorite actor is given to all who purchase tickets, necessarily make the exhibition private.

We are of opinion that the definition of a public exhibition contained in the first part of the ruling was correct and appro-

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priate as applied to the case; and further that "if this was such an exhibition" no valid objection can be made to the last part of the instruction. The general effect of the instruction was to leave to the jury the general question whether this was an exhibition to which the public as such were invited and admitted as to other places of amusement, and that if such was the case they might find that it was public notwithstanding the fact that an applicant was required to sign a request to become a member of the club, provided it was understood that every applicant so signing would be allowed to purchase a ticket and witness the exhibition. The whole question whether this club machinery was a mere sham and a fraudulent contrivance to evade the law was to be left to the jury.

In view of the evidence as to the relative size of the hall and the membership of the club; of the lack of evidence as to whether any member was ever expected to pay any assessment, or was subjected to any pecuniary obligation whatever, or had any voice in the management of its affairs; of the facility with which a person could become a member, especially if he wanted to witness one of these exhibitions, blank forms of application for members being kept "convenient to the ticket office"; of the fact that upon this occasion no one not drunk or disorderly was rejected by Sanborn the ticket seller; and further of the lack of evidence as to whether the board ever exercised the right to reject a person or ever inquired into the matter, it cannot be said as matter of law that the jury could not have found that so far as respected this exhibition the use of this club machinery was in substance a contrivance for an exhibition to which the public as such were invited and admitted. We see no error in the instructions.

Verdict to stand.

J. H. Vahey, C. H. Innes & P. Mansfield, for the defendants.

F. H. Chase, Second Assistant District Attorney, for the Commonwealth.

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CHARLES B. LENTELL *vs.* BOSTON AND WORCESTER STREET RAILWAY COMPANY.

Middlesex. December 2, 1904. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Constitutional Law. Boston and Worcester Street Railway Company. Equity Jurisdiction.

By St. 1903, c. 163, the Boston and Worcester Street Railway Company was authorized to construct and maintain a wooden trestle over and across the tracks of the Boston and Albany Railroad on Boylston Street in Newton, which should be discontinued and removed upon the completion of the work of the abolition of the grade crossing of the tracks of that railroad with Boylston Street. Section 3 is as follows: "The construction, maintenance and use of the said trestle shall be deemed not to be an additional easement or servitude. If any person is legally damaged in his property by the construction, maintenance or use of the said trestle the damages may be assessed by a jury of the Superior Court upon proceedings conducted as provided with respect to the laying out of ways in the city of Newton." *Held*, that the statute is constitutional, the section quoted declaring that the trestle does not interfere with rights of property if the Legislature can make such a declaration, or, if such a declaration cannot be made constitutionally, that any person whose property rights are interfered with shall have compensation. *Held, also*, that the statute is not unconstitutional by reason of failing to designate the person who is to pay the compensation found to be due, as the statute must be construed to provide that in case damages are suffered the compensation shall be paid by the railway company for whose benefit alone the permission to construct the trestle is granted, and that the remedy of the owner of property so damaged is exclusively under the statute and not by a bill in equity.

BILL IN EQUITY, filed March 7, 1904, alleging that the defendant, claiming authority under St. 1903, c. 163, had constructed a wooden trestle on Boylston Street in Newton over which it operated its cars, greatly damaging and diminishing the value of the plaintiff's land and dwelling houses on that street, and alleging further that the statute was unconstitutional and void and afforded the plaintiff no adequate remedy in damages, praying that the defendant might be enjoined from maintaining the trestle and might be ordered to remove it, and to pay to the plaintiff his damages already sustained, and for further relief.

The defendant demurred, and the case came on to be heard upon the bill and demurrer before *Lathrop*, J., who reserved it

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for determination by the full court. If the demurrer should be sustained the bill was to be dismissed.

St. 1903, c. 163, is as follows:

"Section 1. The Boston and Worcester Street Railway Company is hereby empowered to construct and operate its street railway over and across the tracks of the Boston and Albany Railroad on Boylston Street in the city of Newton upon a wooden trestle, which it is hereby authorized to construct and maintain in said Boylston Street for that purpose, in conformity with plans to be submitted to and approved by the board of railroad commissioners. The use of said trestle shall be discontinued and said trestle removed upon the completion of the work of the abolition of the grade crossing of the tracks of said railroad with Boylston Street.

"Section 2. In constructing the said trestle a clear headroom of sixteen feet shall be provided over the top of the present tracks of the Boston and Albany Railroad, and the grade of the approaches to the crossing upon the trestle shall not exceed six and five tenths feet per one hundred feet.

"Section 3. The construction, maintenance and use of the said trestle shall be deemed not to be an additional easement or servitude. If any person is legally damaged in his property by the construction, maintenance or use of the said trestle the damages may be assessed by a jury of the Superior Court upon proceedings conducted as provided with respect to the laying out of ways in the city of Newton.

"Section 4. This act shall take effect upon its passage."

W. D. Turner, (*A. U. Hersey* with him,) for the plaintiff.

G. W. Cox, for the defendant.

LORING, J. We are of opinion that the plaintiff has mistaken his remedy. The trestle complained of having been erected under the specific authority of the Commonwealth is a legal structure unless the act authorizing it is unconstitutional. The plaintiff contends that the act is unconstitutional.

The first ground on which he seeks to support this contention is that although the trestle is in fact and in law an interference with the plaintiff's right of property, "it is difficult to perceive what damages could be assessed in accordance with the provisions of this statute; an assessment of the damage to the plain-

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tiff's rights in the street of light, air and access is forbidden by the clause declaring that the construction, maintenance and use of the trestle 'shall be deemed not to be an additional easement or servitude.'" If the trestle does interfere with a right of property which the plaintiff had before the statute in question was enacted, this clause of the statute is void. But it does not follow (as the plaintiff has contended) that the whole act is thereby rendered invalid. We think that it was the intention of the Legislature to declare that the trestle did not interfere with the rights of property of any person, if such a declaration could be made by it; but that if such a declaration could not be made constitutionally, any person whose property rights were interfered with should have compensation.

The other ground on which the plaintiff contends that the act is unconstitutional is that the person is not ascertained who is to make payment of the compensation found to be due. And in this connection the plaintiff relies on *Bent* v. *Emery*, 173 Mass. 495. But that was a very different case. There the harbor and land commissioners had been authorized by St. 1898, c. 278, § 3, to dredge the flats in South Bay for the improvement of the channel, and acting under that act they had undertaken to remove from the flats belonging to the plaintiff a substantial quantity of earth. It is pointed out in *Bent* v. *Emery*, 173 Mass. 495, 497, that "the act of 1898, authorizing the changes, was passed on the petition of the Roxbury Central Wharf Company, the owner of adjoining wharves, which will be benefited by them." It is one thing to imply that the Commonwealth is to pay for an improvement which it is true is a public one but which was set in motion by a private individual who was to be benefited by it, and quite another thing to imply that it is the street railway company which is to make compensation, if any is due, for the trestle here in question. To construe the act in question authorizing the defendant railway to build the trestle in question across the tracks of the Boston and Albany Railroad on Boylston Street it is necessary to have in mind the law then existing as to a street railway constructing its tracks across the location of a steam railroad.

It could not build across a railroad location at grade without the consent of the railroad commissioners or of a special com-

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mission appointed under R. L. c. 112, § 64. See R. L. c. 112, § 63. It could take land to enable it to cross above or below the tracks of the railroad if it procured the approval of the aldermen, if in a city, or of the selectmen, if in a town; and it could construct such a crossing on land so taken. R. L. c. 112, §§ 65, 66, 67. Finally, by R. L. c. 112, § 68, the aldermen of a city or the selectmen of a town were permitted to authorize structures partly or wholly within a public way necessary for carrying the street railway over or under the railroad. From the fact that the defendant railway procured the passage of St. 1903, c. 163, and from the terms of that act, it must be assumed that this railway company found it impracticable to get its tracks across the Boston and Albany location where that location crossed Boylston Street in any of the ways authorized by the Revised Laws. It is manifest that a separation of grades of the railroad and highway at that point was expected to be made under the policy lately pursued by the Commonwealth with respect to grade crossings. It was under these circumstances that the Legislature authorized the defendant railway to complete the construction of its tracks by the erection of the temporary trestle in question, carrying its railway over the Boston and Albany Railroad, on condition that it should be "removed upon the completion of the work of the abolition of the grade crossing of the tracks of said railroad with Boylston Street." This permission was granted to the defendant railway for its benefit and for the benefit of no one else, and, by necessary implication, if anything was to be paid it was to be paid by it. The provision that the compensation should be recovered "upon proceedings conducted as provided with respect to the laying out of ways in the city of Newton," was manifestly inserted to give to the plaintiff and persons similarly situated all the rights which he or they had in Boylston Street, which is a public way in the city of Newton, and for no other purpose.

The entry must be

Bill dismissed.

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ETTA A. WHITE & another *vs.* WILLIAM H. DODGE & others.

Suffolk. December 2, 1904. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Bills and Notes. Pledge.

If one, who has obtained by fraud a negotiable promissory note and as security for it a mortgage and mortgage note, sells and indorses the first named note before maturity and transfers it with its security to a *bona fide* purchaser for value, the purchaser takes a clear title to the note with its security which is good in equity as well as at law, and it does not matter whether the mortgage note held as security is negotiable.

KNOWLTON, C. J. This is a bill in equity in which the first named plaintiff, acting by her guardian, seeks to set aside a note of $1,591.65, given by her to the defendant Dodge and by him indorsed to the defendant Conant, and also an assignment of a mortgage and note for $9,000 given to her by George B. White, and assigned by her to Dodge as collateral security for the first mentioned note. The master to whom the case was referred found the facts in favor of the defendants upon nearly all the questions in issue. Exceptions to his report were overruled in the Superior Court, and a decree was entered for the defendants, from which the plaintiffs appealed.

A careful reading of the very voluminous report of evidence shows no error on the part of the master material to his decision that "there is no ground for granting the relief prayed for in the plaintiffs' bill." There is nothing in the testimony that leads us to doubt the correctness of his finding that "the defendant Conant was a *bona fide* purchaser of the said two notes and mortgage for value and without notice." The affirmative evidence on this point is clear and convincing. The note of $1,591.65 was payable on time, and was indorsed to the defendant Conant before maturity. The note and mortgage for $9,000 which had been assigned by the first named plaintiff to Dodge as security when she made the first mentioned note, were assigned by him to Conant as a part of the transaction when he transferred the other note.

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The plaintiffs' principal claim rests upon the alleged fraud of Dodge in obtaining the execution and delivery to him of these contracts. If he was guilty of fraud, as she alleges, the title which he obtained was voidable by her; but it was sufficient to enable him to give a perfect title to a *bona fide* purchaser for value, before she took measures to avoid it. R. L. c. 73, §§ 69, 74. *Wheeler* v. *Guild*, 20 Pick. 545. *Rowley* v. *Bigelow*, 12 Pick. 307, 312. *Hoffman* v. *Noble*, 6 Met. 68. *Moody* v. *Blake*, 117 Mass. 23, 26. This elementary proposition of law is a complete answer to the plaintiffs' chief contention.

The plaintiffs say that the note secured by the mortgage was not negotiable, because there is a provision in the mortgage that the mortgagor may pay it, if he chooses, before its maturity. The note itself contains no such provision, and is in terms and in law negotiable. But if, considering both the note and mortgage, a purchaser who takes them together has notice that he does not acquire, under all circumstances, all the rights of a purchaser of ordinary commercial paper (see *Strong* v. *Jackson*, 123 Mass. 60), this is not material in the present case. For, as between the maker and the payee, there was no infirmity in the mortgage note or in the mortgage. Together they constitute valuable property. They were assigned to Dodge. If the contract of assignment was voidable for fraud, his conveyance of them to a *bona fide* purchaser for value transferred a good title, just as such a conveyance, under similar circumstances, would give a good title to a stock of goods which the vendor had obtained by fraud. See cases above cited. See also as to the effect of the previous record of the mortgage, R. L. c. 127, § 5. The purchaser could, therefore, avail himself of the note and mortgage and enforce them, without reference to the question whether the mortgage note was negotiable.

The master rightly found that there was a good delivery of the note and mortgage from George B. White to the first named plaintiff. The weight of the evidence supports the proposition that Dodge held the papers merely as her attorney and agent, and that they were not retained by him for a possible future delivery.

If the case turned upon the question whether Dodge's charges against the plaintiffs were reasonable or excessive, the master

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well might have found, in view of the fact that Dodge was not an attorney admitted to practice in the courts of Massachusetts, and seemingly was not familiar with our laws, that his bill was unreasonable and his charges exorbitant. But such a finding would give the plaintiffs no claim against the defendant Conant.

Even if it were found that Dodge took an improper advantage of the relations of confidence existing between him and his client, and thereby fraudulently induced her to execute the note and assign the other note and the mortgage, it would not affect the rights of the plaintiffs against Conant, who is a *bona fide* holder of the notes for value.

The result is that the decree of the Superior Court must be affirmed, except in that part which gives costs to the defendant Dodge. The decree to be entered will give him no costs.

So ordered.

F. O. White, for the plaintiffs.

W. H. White, for the defendant Conant.

SAMUEL WELLS & others, trustees, *vs.* STREET COMMISSIONERS OF THE CITY OF BOSTON.

Suffolk. January 9, 1905. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Tax, Assessment of betterments. *Boston. South Terminal Station. Constitutional Law.*

St. 1896, c. 516, providing for the construction and maintenance of the south terminal station in Boston, which required the construction of Summer Street and Cove Street as described in § 11 of that statute, did not require such construction to be in accordance with the provisions of the board of survey act, St. 1891, c. 323, as amended by St. 1892, c. 418, imposing the provisions of St. 1890, c. 418, §§ 4–6, and an assessment for betterments on account of the location and construction of the two streets named is valid although the methods prescribed by the earlier statutes were not followed.

In authorizing the assessment of betterments by § 14 of St. 1896, c. 516, providing for the construction and maintenance of the south terminal station in Boston, the Legislature properly treated the changes in the streets and the construction of the station as parts of a single public improvement constituting one joint

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enterprise which would bring special and peculiar benefits to the estates in the vicinity, and such authorization of the imposition of betterments is constitutional. Following *Sears* v. *Street Commissioners*, 180 Mass. 274.

PETITION, filed October 7, 1902, for a writ of certiorari, addressed to the board of street commissioners of the city of Boston to quash their proceedings assessing betterments upon real estate of the petitioners and others under St. 1896, c. 516, § 14.

The case was heard by *Braley*, J. upon the petition and the return of the respondents. The petitioners requested a ruling that the section above named under which the assessments were made was in violation of the fifth and fourteenth amendments of the Constitution of the United States, and that the order of the respondents and the assessments thereunder were illegal and void. The justice refused to rule as requested, and at the request of the petitioners reserved the case for determination by the full court.

H. E. Bolles, (*O. O. Partridge* with him,) for the petitioners.

T. M. Babson, for the respondents.

KNOWLTON, C. J. This is a petition for a writ of certiorari to quash an assessment of betterments, made under the St. 1896, c. 516, on account of the location and construction of Summer Street and Cove Street and the south terminal station in Boston, under the requirements of this statute. It comes before us on a report by a single justice, and the principal questions are whether the expenditures were made in violation of statutes under which the work should have been done, in order to lay the foundation for an assessment, and whether the provision for the assessment is unconstitutional. The contention is that this statute, by implication, required the work of construction of these two streets to be done in the same way as if they had been laid out under the St. 1891, c. 323, sometimes called the board of survey act, as amended by the St. 1892, c. 418. If the work had been done under this amended statute, the superintendent of streets, as an officer in charge of a department of the city, would have been acting subject to the provisions of the St. 1890, c. 418, §§ 4–6, and a disregard of these provisions might defeat the right of assessment. *Warren* v. *Street Commissioners*, 181 Mass. 6. But the statute under which the city was acting in the

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construction of Summer Street and Cove Street does not contain a provision making these earlier statutes applicable, as did the statute for the laying out and construction of Huntington Avenue, under which *Warren* v. *Street Commissioners* was decided. See St. 1894, c. 416, § 4. It is a statute providing in detail for the construction of a great public improvement. The section which relates particularly to the changes in streets (St. 1896, c. 516, § 11) prescribes exactly what shall be done, except that the required width of each of these two streets is stated as at least one hundred feet, thus leaving it possible to make them of a greater width. It calls for the discontinuance of several streets and parts of streets, and the extension of others to specified points. The part which the city and its officers were to take in regard to these is stated in a single sentence, as follows: "Said board of street commissioners shall discontinue, widen, and lay out said streets in such manner as may be approved by the mayor, and said city shall construct said streets and make said changes in said bridges as above specified." The section ends with these words: "The supreme judicial court or any justice thereof shall have jurisdiction in equity to enforce the provisions of this section." It is manifest that most if not all of the provisions of the board of survey act were inapplicable to the changes to be made under this statute. Except in a single particular, the board of street commissioners had no discretion in regard to the discontinuance, or widening, or extension of any of these streets. The only discretion that was given to anybody, in regard to the nature of the changes, was as to whether Summer and Cove Streets should be one hundred feet wide, or of a greater width. In regard to this the street commissioners could not determine finally, but their decision was to be subject to the approval of the mayor. The action of these officers, and action of the city for the construction of the work, could be compelled by an order of the Supreme Judicial Court. The completion of these improvements was quite outside of the ordinary proceedings for laying out and constructing streets. Work to be done by the terminal company was to be carried on in connection with the changes in the streets. In reference to that company also the statute was mandatory.

Nothing is said in the statute in regard to the manner of

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executing the mandates of the law. "Said city shall construct said streets." Without something more than this, we hesitate to say that this special, peculiar work was brought within provisions made for the transaction of general municipal business, absolutely requiring the work to be done by the head of a particular department, through such contracts as are referred to in St. 1890, c. 418, §§ 4–6. In a work of this kind there might be occasion for co-operation of the different parties engaged in it, or other reasons which might make it desirable that the authorities of the city, by proper action, should provide for the construction, or a part of the construction, in another way. If the Supreme Judicial Court had been called upon to make an order for the construction, the statute hardly would have justified an order to the superintendent of streets, or any other head of a department, but only an order to the city or its chief executive officer.

The work has been done by the city through its representatives, and paid for by it. From the averments of the petition, and from other parts of the record, although it does not appear in the answer, we infer that the statute last mentioned was not treated as applying to this work. It is a long time since the streets were completed. Assessments have been made on account of the improvements, amounting in the aggregate to almost one million dollars, and most of them, presumably, have been paid. After this lapse of time, with an apparent general acquiescence in the construction put upon this part of the statute by those acting openly under it, we ought not to read into it a meaning which would invalidate the assessment, unless such a meaning is plainly discoverable in its language. We are of opinion that the Legislature did not intend to prescribe any particular mode of doing the work on these streets, as a condition precedent to the right to assess a part of the cost upon estates benefited.

With this view of the law, we need not consider other questions argued in connection with the motion for a further return by the respondents. If there was an irregularity in including in the first instance a part of the expense of the construction of sewers, the amount included was not so large as the amount afterwards deducted, and it does not invalidate the assessment.

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The constitutionality of the statute was considered and affirmed in *Sears* v. *Street Commissioners*, 180 Mass. 274. We are all of opinion that the Legislature, in dealing with the benefits by the amount of which the assessment should be limited, well might treat the changes in the streets and the construction of the station as parts of a single public improvement constituting one joint enterprise, bringing special and peculiar benefits to the estates in the vicinity.

Petition dismissed.

LUCY L. SHELTON *vs.* ALBERTINA H. SEARS & others.

Suffolk. January 10, 1905. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Statute, Construction. *Dower. Widow. Equity Jurisdiction.*

When separate statutes concerning the same general subject are brought together by codification, if they previously have received judicial construction and are re-enacted without substantial change, it will be presumed that the Legislature adopted the construction given by the court.

Under Pub. Sts. c. 127, § 18, the widow of one dying testate, who has made no provision for her in his will, can establish her right to dower only by filing in the registry of probate within six months after the probate of the will a writing signed by her claiming such portion of his estate as she would be entitled to if he had died intestate.

Ignorance of the law is no more an excuse in equity than at law for failing to assert a right within the time limited by statute.

WRIT OF DOWER, dated March 15, 1902, brought by the demandant as the widow of Henry S. Shelton, deceased testate on January 18, 1883.

In the Superior Court the case was tried before *Bond*, J. The jury made the special findings quoted in the fourth paragraph of the opinion, and returned a general verdict for the demandant. At the request of the tenants the judge reported the case for determination by this court.

R. M. Morse & A. D. Hill, for the tenants.

W. P. Hale, for the demandant.

BRALEY, J. This is an action brought by the demandant as the widow of Henry S. Shelton against the tenants who claim

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under his will, to have her dower set out in lands of which he died seised.

It was the contention of the tenants that no valid marriage had ever been solemnized between the demandant and the testator as required by the provisions of Pub. Sts. c. 145, § 22.

No record of her marriage was produced, but she took the ground that it had been duly performed in the presence of a clergyman, and relied on the further statutory provision that "No marriage solemnized before a person professing to be . . . a minister of the gospel . . . shall be deemed or adjudged to be void . . . if the marriage is in other respects lawful, and is consummated with a full belief on the part of the persons so married, or of either of them, that they have been lawfully joined in marriage." Pub. Sts. c. 145, § 27. *Meyers* v. *Pope*, 110 Mass. 314, 316. See *Commonwealth* v. *Munson*, 127 Mass. 459.

At the trial in the Superior Court much evidence was introduced on this issue of fact, and two questions were submitted to the jury.

First. "Was a marriage between the demandant and Henry S. Shelton solemnized at Worcester on June 16, 1868, by a person professing to be a clergyman?"

Second. "Was such marriage consummated with the full belief on the part of the demandant that she had been lawfully married?"

Both were answered in the affirmative, and the tenants requested a ruling that the demandant could not prevail because no provision having been made for her in the will, she had not filed any waiver, or claim to dower, as required by Pub. Sts. c. 127, § 18, in force at the death of the testator.

This request was denied, and a general verdict for the demandant having been returned, the case is before us on a report that presents for our consideration the correctness of the ruling.

It is not in dispute that Henry S. Shelton died on January 18, 1883, leaving a will, which was duly admitted to probate on February 14, 1883; that the demandant knew of the fact that no provision was made for her, and that as his widow she was entitled to share in his estate. But she did not file in the probate office any waiver of the will, or claim to the estate, and made no demand until she brought this action on March 15, 1902.

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The estate demanded is technically that of dower alone, and there is no occasion to consider what rights, if any, she had in the personalty, or whether she was entitled upon taking proper action to more than a dowable interest in the lands of her husband. *Elliot* v. *Elliot*, 137 Mass. 116. *Mathews* v. *Mathews*, 141 Mass. 511.

In connection with the gradual enlargement of the rights of a married woman in the property of her deceased husband, each revision of our statutes has made changes of the entire law of dower, and resort must be had to them to ascertain when dower is barred, and how such bar can be established. Rev. Sts. c. 60. Gen. Sts. c. 90. Pub. Sts. c. 124. See R. L. c. 132; c. 135, § 16; *Lakin* v. *Lakin*, 2 Allen, 45, 46; *Whitaker* v. *Greer*, 129 Mass. 417; *O'Gara* v. *Neylon*, 161 Mass. 140.

It must be taken as settled that if a will makes provision for the widow of the testator, such provision is in place of, and not in addition to, her right of dower in his lands which would arise in a case of intestacy, unless "such plainly appears by the will to have been the intention of the testator." Rev. Sts. c. 60, § 11. Gen. Sts. c. 92, § 24. St. 1861, c. 164, § 1. Pub. Sts. c. 127, § 20. *Reed* v. *Dickerman*, 12 Pick. 146, 149. *Staigg* v. *Atkinson*, 144 Mass. 564, 570. *Matthews* v. *Thompson*, 186 Mass. 14.

If she prefers what the law grants as of right rather than what her husband has provided, since Rev. Sts. c. 60, § 11, and before R. L. c. 135, § 16, was enacted, she must exercise her election within six months from the date when the will was admitted to probate. *Atherton* v. *Corliss*, 101 Mass. 40, 46. By Gen. Sts. c. 92, § 24, she was further required to express such election by a waiver in writing filed in the probate office, and a uniform rule of evidence to prove the fact was thus established, and has since continued in force. See *Reed* v. *Dickerman*, *ubi supra*, and *Pratt* v. *Felton*, 4 Cush. 174; Pub. Sts. c. 127, § 18; R. L. c. 135, § 16. But after her election it would be inequitable that she should be allowed to claim under the will, and at the same time, by demanding dower, to assert a title which might tend to impair or defeat its full testamentary effect unless such intention appeared. *Delay* v. *Vinal*, 1 Met. 57, 65.

Where, however, as in this case, the will makes no reference to or provision for the widow, there is nothing for her to choose,

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and, if she is still obliged to file a waiver or be barred of dower, the requirement must be found in legislation subsequent to St. 1861, c. 164, § 1.

Before St. 1854, c. 428, was enacted, which became in part Gen. Sts. c. 92, § 24, the language used, "she shall . . . make her election," imports that she may either enforce her right to dower, or, by failure to act, may be presumed to have accepted the provisions made for her in the will.

But the changes which then first appear, and are continued by re-enactments as a part of our present statutory law, in substituting "may" for "shall," and providing for a waiver instead of an "election" by the widow, made no change in the meaning or purpose of the law. For a widow was still left free to exercise her power of choice. *Phillips* v. *Fadden*, 125 Mass. 198, 201.

By St. 1861, c. 164, § 3, § 24 of the Gen. Sts. c. 92, was repealed, but the requirement of election was re-enacted.

No further change appears until St. 1871, c. 200, declared that St. 1861, c. 164, § 1, should "be so construed that a widow for whom no provision is made in the will of her husband, may file her waiver of the provisions of the will in like manner and with the same effect as if provision had been made for her in the will."

It was evidently the object of the statute to require a widow not provided for in her husband's will, but who otherwise would be entitled to dower, to make a claim as dowress, or, by her failure to act, the will with her implied assent would thus operate to bar her right.

This more clearly appears when the distinction between the result reached in the two classes of cases is considered. In one case the will accepted contains provisions in place of dower, and the widow becomes a purchaser for value, or if the provisions are rejected, she takes her legal estate; and in either event she gets her dower or its equivalent; *Towle* v. *Swasey*, 106 Mass. 100, 105; *Richardson* v. *Hall*, 124 Mass. 228, 234; while in the other case she is left portionless by the will, and unless a claim for what the law gives her is duly made, she is excluded from all participation in the distribution of the estate.

When these last statutes were codified by Pub. Sts. c. 127,

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§ 18, this construction was plainly adopted by the Legislature in providing for a waiver, or election, where the will made provision for her; and requiring, in the absence of such a provision, a claim to be filed for "such portion of his estate as she would have been entitled to if he had died intestate."

We have thus far considered the question presented without reference to the case of *Shannon* v. *White*, 109 Mass. 146. In that case a testator domiciled in another State died seised of lands in this Commonwealth. His will, which contained no provision for the petitioner, who claimed to be his widow, was admitted to probate at his domicil. Upon ancillary probate being granted here, she appealed from the decree, and, pending the appeal, while the estate was in charge of a special administrator, brought a petition for an allowance under Gen. Sts. c. 94, § 9, which provided that during such a contest a reasonable allowance might be made to the widow and children as an advancement "not exceeding such portion of the income of the estate as they would be entitled to whether the will is finally proved or not."

It therefore became necessary, in deciding the case, to determine the scope of St. 1861, c. 164, § 1, as amended by St. 1871, c. 200.

In affirming the decree of the Probate Court, which had denied the petition, it was said that if the petitioner was his widow, she was not entitled to share in the personalty, which must be administered according to the law of the testator's domicil, of which no evidence was offered, nor to dower in his real estate, because "she is not entitled, under our laws, to dower in his real estate, without filing in the probate office a written waiver of the provisions of the will, which she has not done." See *Ross* v. *Ross*, 129 Mass. 243, 247.

This decision was made in 1872, and in 1882 the Public Statutes were enacted.

It may be presumed, where separate statutes covering the same general subject are brought together by codification, if they previously have received judicial construction, and are re-enacted without change of the rule laid down, that the Legislature intended to adopt the same construction. *Commonwealth* v. *Hartnett*, 3 Gray, 450.

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By either way, then, the same conclusion is reached, and as the demandant failed to file a waiver of the will or to claim dower, she cannot maintain her action at law.

It is suggested that she may have relief in equity against the operation of the statute on the ground of accident or mistake in not earlier asserting her claim, and that she should be allowed by amendment to change her writ of dower into a bill in equity. But the form of procedure cannot change the result. Not only is no fraud or concealment shown, but she knew of the contents of the will and of its admission to probate, and at the time was acting under legal advice. *Motherway* v. *Wall*, 168 Mass. 333, 338.

The only excuse offered for her inaction is that she was ignorant of the law, but this is not sufficient in equity any more than at law to overcome the express limitation fixed by statute within which she must act, or be forever barred. *Upham* v. *Wyman*, 7 Allen, 499, 502. *Currier* v. *Studley*, 159 Mass. 17. See *O'Gara* v. *Neylon*, 161 Mass. 140.

The demandant further relies on Pub. Sts. c. 124, § 15, as saving her rights, and contends that she is entitled to be endowed anew because deprived "of the provisions made for her by will or otherwise in lieu of dower."

This section, however, has no application, as there were no "provisions made for her by will," by jointure, or other pecuniary provision. See Pub. Sts. c. 124, §§ 7, 8.

On the merits of the case the demandant cannot prevail, and we do not deem it necessary to consider the tenants' exceptions to the exclusion of certain questions put to her as a witness on cross-examination.

Under the reservation in the report the order must be

Judgment for the tenants.

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GEORGE U. CROCKER *vs.* FREDERICK J. BUTTRICK & others.

Suffolk. January 10, 1905. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Bond. Constable.

An action can be brought on the official bond of a constable in the city of Boston in the name of the city treasurer to whom the bond has been given under R. L. c. 25, § 90, c. 26, §§ 2, 14, without obtaining authority from any public officer.

CONTRACT, under St. 1814, c. 165, and acts in addition or amendment thereto, on a constable's bond given by the defendant Buttrick as principal and the defendants Deane and Gunn as sureties for the faithful performance by Buttrick of his duties as a constable in the city of Boston. Writ dated March 22, 1904.

In the Superior Court the case was tried before *Schofield*, J. At the close of the plaintiff's evidence the defendants offered no evidence, and, among other requests, requested the judge to rule: 1. That on all the evidence the jury must return a verdict for the defendants. 3. That no third person can bring an action for his own benefit unless authorized by the proper officer. 4. That there is no authority from the proper officer for the plaintiff to bring this suit in her own name, and for her own benefit. 10. That this action cannot be maintained under St. 1814, c. 165, and acts in addition or amendment thereto, they having been repealed by the Revised Laws.

The judge refused to rule as requested, and ruled that upon the evidence and admissions of fact the plaintiff had shown a breach of the bond, and was entitled to judgment in the penal sum of the bond, $3,000, and that execution should issue for the amount of the judgment of Hyams against the defendant Buttrick which is mentioned in the opinion, with interest thereon, and ordered the jury to return a verdict for the plaintiff in that sum, which was agreed by the parties to be $170.42. The defendants alleged exceptions.

J. L. Sheehan, for the defendants.

D. Benshimol, for the plaintiff.

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KNOWLTON, C. J. This is an action brought by one Hyams in the name of the treasurer of the city of Boston, upon a constable's official bond given under the provisions of the R. L. c. 25, § 90, and c. 26, § 14. A copy of the bond is made a part of the bill of exceptions, and it is stated that the giving, approval and filing of the bond appeared in evidence. It was admitted that a judgment was obtained by Hyams against the defendant Buttrick, for acts done by him as constable, and that the judgment was not satisfied after a demand was made upon him, but remained unsatisfied at the time of bringing this action.

The action was brought under the St. 1814, c. 165, and the acts in addition or amendment thereto, and the principal contention of the defendants is that an action could not be brought upon the bond without authority obtained from a public officer. The R. L. c. 25, § 90, provides, in regard to bonds given by constables of towns, that "any person injured by a breach of the conditions thereof may, at his own expense, sue thereon in the name of the town, and the proceedings shall be the same as in an action by a creditor on an administration bond." Under the R. L. c. 149, § 20, a creditor may sue for his own benefit on the bond of an administrator, if he has recovered judgment for his debt against the administrator, and the administrator, after a demand, has neglected to pay it, or to show sufficient goods or estate of the deceased to be taken on execution for the satisfaction of it. An action of this kind may be brought without obtaining leave from the Probate Court. *McKim* v. *Roosa*, 183 Mass. 510. Under the R. L. c. 26, § 14, bonds of constables in the city of Boston are given to the treasurer of the city, and by § 2 of this chapter it is provided that "Chapter twenty-five and all other laws relative to towns shall apply to cities so far as consistent with the general or special laws relative thereto." There is much ground for an argument that these general laws may be applied to the present case, as they seem to have been applied in a similar case brought upon a constable's bond by the treasurer of Boston. See *Tracy* v. *Merrill*, 103 Mass. 280.

It has been stated, however, in several cases within the last forty years, that the St. 1814, c. 165, is unrepealed and still in force. *Calder* v. *Haynes*, 7 Allen, 387. *Tracy* v. *Warren*, 104 Mass. 376. *Hayes* v. *Nash*, 129 Mass. 62. In this view of the

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law the result is the same; for the provisions of that statute, as applicable to cases like the present, are identical with those of R. L. c. 25, § 90. It follows that the action properly was brought and that the plaintiff is entitled to recover.

There is no foundation for the contention that the judge could not order a verdict for the plaintiff, but should have submitted the facts and evidence to the jury. The bill of exceptions shows that every material fact appeared or was admitted.

Exceptions overruled.

CHARLES H. FLETCHER *vs.* BOSTON AND MAINE RAILROAD & others.

Suffolk. January 10, 1905. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Contributory, On railroad. *Pleading, Civil. Joint Tortfeasors.*

A passenger in a railroad train who, after the name of the station at which he is to alight has been called and while the train is moving slowly but has not stopped, leaves the car and stands upon the first of four steps leading from the side of the platform at the end of the car, and while there is thrown to the ground and injured, his fall being caused by the steps being bent under the platform of the car on coming in collision with a truck in charge of a servant of a newsdealer, is not in the exercise of due care and cannot recover either from the railroad company or the newsdealer, although one or both of them may have been negligent.

Semble, that a passenger in a train approaching a station, who is injured by an accident caused by the train coming in collision with a truck negligently left too near the track by the servant of a newsdealer, cannot sue the railroad company and the newsdealer as joint tortfeasors, even if both are negligent, their liability, if it exists, being several as differing in character.

TORT, against the Boston and Maine Railroad, and George C. Prince and Arthur D. Prince, newsdealers, doing business under the name of George C. Prince and Son, for injuries incurred in being thrown from a train of the defendant railroad company at its station in Lowell. Writ dated January 31, 1902.

At the trial in the Superior Court *Maynard*, J. ordered a verdict for the railroad company and also for the other defendants; and the plaintiff alleged exceptions.

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W. B. French, (*E. L. Curtiss* with him,) for the plaintiff.

A. R. Tisdale, (*E. J. Rich* with him,) for the railroad.

J. C. Burke & J. F. Corbett, for the defendants Prince, submitted a brief.

BRALEY, J. Before the plaintiff can recover against either the railroad or the individual defendants, he must offer some evidence that at the time of the accident he was in the exercise of due care.

It appears that he properly became a passenger on a train of the defendant railroad, and took a seat in the smoking compartment of a combination car, the other part of which, next to the locomotive, was used for baggage.

He left his seat some time before reaching his destination, went into the baggage compartment, and engaged in conversation with the baggage master, who, when the train approached it for the purpose of stopping, called the station at which the plaintiff was to alight. After this as the train was moving slowly, the plaintiff left the car and stood on the first of four steps that led from the platform of that end, and while in this position the steps came into collision with a truck in charge of a servant of the other defendants, who was in the act of placing it within a space between two parallel tracks, over one of which the train was passing. When the truck was caught by the moving train it struck the steps, bent them under the platform, and caused the plaintiff to be thrown to the ground and injured.

Plainly if he had remained in the car until the train stopped this danger would have been avoided, but he voluntarily left a place provided for him as a passenger, and where he would have been safe, and exposed himself to the chance of injury which common experience has shown is incident to standing upon the platform of a moving railroad car.

The fact that the station had been announced, and the train was being reduced in speed preparatory to stopping, or that the combination of conditions causing the accident were peculiar, and ordinarily not to be anticipated, do not furnish a sufficient excuse for his conduct. See *Manning* v. *West End Street Railway*, 166 Mass. 230, 232.

Even if it could be found that the baggage master, being a servant of the railroad, properly might announce the stations for

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the information of passengers, who would be justified in treating such an announcement as an invitation to leave the car as held in *Floytrup* v. *Boston & Maine Railroad*, 163 Mass. 152, yet this is not an invitation to leave a train while in motion, but after it has stopped. At the farthest it afforded no justification for the plaintiff to leave the car, and attempt to finish his journey on the platform or steps. *England* v. *Boston & Maine Railroad*, 153 Mass. 490, 492.

As the plaintiff was not compelled by necessity arising from insufficient means of transportation furnished, or by the management of its train on the part of the carrier, or misled by an invitation to leave the place properly provided for his conveyance, the action taken by him was for his own convenience, and at his own risk. *Hickey* v. *Boston & Lowell Railroad*, 14 Allen, 429. *Files* v. *Boston & Albany Railroad*, 149 Mass. 204, 206.

The plaintiff also seeks to hold all the defendants as joint tortfeasors, but the alleged wrong from which he suffered was not within that class of tortious acts for which, if intended, all who participate may be held liable, either severally or jointly. *McAvoy* v. *Wright*, 137 Mass. 207, 210.

His injury arose from an alleged breach of duty of the railroad to safely transport him as a passenger, and with the performance of this service the other defendants were not connected. *Stone* v. *Dickinson*, 5 Allen, 29, 31.

It may be assumed that the original and amended declarations contained sufficient allegations in the various counts to charge the individual defendants, either jointly with the railroad, or as severally liable. But it is clear, since there was but one injury by whomsoever caused, that the contributory negligence of the plaintiff likewise prevents his recovery against them under any form of pleading. *Murphy* v. *Deane*, 101 Mass. 455, 466.

Exceptions overruled.

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DENNIS McCROHAN *vs.* ARCHIBALD T. DAVISON.

Suffolk. January 11, 1905. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Contributory, On highway. *Evidence*, Opinion, Materiality.

One crossing a street on an icy morning in winter who looks both ways and sees no team approaching except a horse and sleigh at a distance and, thinking that he has plenty of time to cross before the horse will reach him, walks on in his usual way without looking again at the horse and sleigh and when he is about a foot from the curbstone is struck by the sleigh and thrown down and injured, can be found to be in the exercise of due care.

In an action for personal injuries from being run into by the defendant's horse and sleigh when crossing a street, the plaintiff can be allowed to testify that he looked in both directions and could see no team approaching except the defendant's horse and sleigh and that he thought he had plenty of time to cross the street. *Whitman* v. *Boston Elevated Railway*, 181 Mass. 138, explained.

TORT for injuries from being run into by the defendant's horse and sleigh while crossing Sumner Street near the corner of Willis Street in that part of Boston called Dorchester. Writ dated February 18, 1901.

At the trial in the Superior Court before *Mason*, C. J., the jury returned a verdict for the plaintiff in the sum of $5,000; and the defendant alleged exceptions, raising the questions stated by the court.

C. S. Knowles, for the defendant.

A. H. Russell, (*R. Sullivan* with him,) for the plaintiff.

KNOWLTON, C. J. This is an action brought to recover damages for being struck by the defendant's sleigh, in which the defendant was driving. The plaintiff and the defendant were the only witnesses who saw the accident, and their accounts of it were conflicting. According to the testimony of the plaintiff, he was crossing a street at its junction with another street, on an icy morning in winter, and saw a horse and sleigh coming at a distance, the street being otherwise unoccupied. Thinking that he had plenty of time to cross before the horse would reach him, he walked on in the usual way, and when he was within about a foot of the curbstone on the opposite corner, he

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was struck by the sleigh and thrown down and injured. The defendant testified that the plaintiff slipped and fell when he was a short distance away from the horse and sleigh, and that no part of the horse or vehicle at any time came in contact with him. The question raised is whether, upon the plaintiff's testimony, there was evidence that he was in the exercise of due care.

This question must be answered in the affirmative. According to the testimony of both the witnesses, the accident happened in the daytime, in a street where there was ample space, of which, at that time, the defendant with his horse and sleigh and coachman, and the plaintiff, were the only occupants. The plaintiff was seventy-two years of age, and seeing the sleigh in the distance, he thought he could pass in safety before it would reach the crossing. He says he walked on as usual. The defendant was about to go around the corner, towards which the plaintiff was walking, and there was plenty of room to drive in such a way as not to strike him. The plaintiff had no reason to expect that a driver of a sleigh would drive against him just as he was about to step from the gutter to the curbstone, when the whole of the street about him was open for travel. He had every reason to believe that he would be seen, and left in safety. In fact he was seen, as the defendant testified, when the sleigh was three hundred feet away. It cannot be said as a matter of law that he was negligent in not watching the sleigh while it was approaching.

The defendant excepted to the admission of this testimony: "I looked east and west and couldn't see nobody coming but this man coming towards me, coming down, and I thought I would have plenty of time . . . to pass the street." In *Coleman* v. *Lowell, Lawrence & Haverhill Street Railway*, 181 Mass. 591, similar testimony was referred to in the opinion as tending to show that the plaintiff was in the exercise of due care. In *Whitman* v. *Boston Elevated Railway*, 181 Mass. 138, after a plaintiff had testified that he formed a judgment at the time as to whether there was a chance for him to cross the track, this court declined to sustain an exception to a refusal to admit testimony of what his judgment was. While it is said in the opinion that from one point of view the evidence was immaterial,

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the opinion shows as the real ground of the decision, that in view of what appeared otherwise, the plaintiff was not harmed by the exclusion of it. We are of opinion that the evidence was competent.

Exceptions overruled.

HARRIET S. DAVIS & others *vs.* NATIONAL LIFE INSURANCE COMPANY.

Suffolk. January 26, 1905. — March 2, 1905.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & LORING, JJ.

Practice, Civil, Petition to vacate judgment. *Judgment.*

It is error to grant a petition to vacate a judgment under R. L. c. 193, § 15, when the petitioner has not given the bond required by § 17 of that chapter, unless the case comes under the exception provided for by § 18.

KNOWLTON, C. J. This action was brought on August 23, 1897, but because of proceedings in equity affecting the rights of the parties, pending in the Circuit Court of the United States, it remained, without active prosecution and without the filing of an answer, until June 10, 1901. It then was dismissed, under the rule of the Superior Court, on the calling of the docket. On February 19, 1902, a final decree was entered in the suit in the Circuit Court of the United States, dismissing the bill. Until after that time the plaintiffs, according to the averments of their petition, had no knowledge of the dismissal of the action. They then filed a petition or motion, in the Superior Court, averring these facts and others, and asking to have the case restored to the docket. An order of notice was issued on this petition, and the court, after a hearing, ordered the order of dismissal to be vacated, and the case to be brought forward and placed on the trial list. The defendant appealed from this last order, and the question is whether, on the face of the record, it appears to be erroneous.

The order that the action be dismissed was an order for a final judgment. Under Rule 25 of the Superior Court, judgment is to

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be entered on the first Monday of every month, under a general order of the court, in all cases ripe for judgment. We understand that such a general order was then in effect, and under the authority of *Pierce* v. *Lamper*, 141 Mass. 20, we have no doubt that a final judgment was entered in the case on the first Monday of July, 1901. This judgment can be vacated or set aside, only on some proceeding authorized by law. *Pierce* v. *Lamper*, *ubi supra*. *Barnes* v. *Smith*, 104 Mass. 363. *Mason* v. *Pearson*, 118 Mass. 61. *Blanchard* v. *Ferdinand*, 132 Mass. 389. *Wood* v. *Payea*, 138 Mass. 61. *Radclyffe* v. *Barton*, 154 Mass. 157. *Darrow* v. *Darrow*, 159 Mass. 262, was a case which was not ripe for a final judgment, and there was no attempt to dispose of it finally. The order was merely to strike it from the docket of cases in which early action might be expected. A final judgment may be set aside on an appeal seasonably taken for the correction of errors of law apparent on the face of the record, or by a petition to vacate a judgment, or by a writ of review, under the R. L. c. 193, §§ 21–37, or by a writ of error, if there are grounds for any of these proceedings. A judgment also may be set aside upon a motion by the prevailing party, filed within three months, in accordance with the provisions of R. L. c. 193, § 14.

The plaintiffs filed an application which is entitled "Motion," and which, in asking that the case be restored to the docket, uses the word "move" instead of "pray." Can this properly be construed as a petition to vacate the judgment, under the R. L. c. 193, § 15? The Superior Court, in issuing an order upon it, calls it a petition and refers to the plaintiffs as petitioners. The kind of notice ordered, namely, personal service upon the defendant of a copy of the petition and the order upon it, was appropriate to a petition to vacate a judgment. The record of the final proceedings upon it treats it as a petition. It is in these words: "After the hearing on the foregoing petition, the court allowed the same, and ordered the order of court to be vacated," etc. Going back to the petition itself, we find a statement of all the material facts upon which an order to vacate a judgment may be predicated. A motion authorized under § 14 cannot rest upon such facts, and can only be made within three months by the prevailing party. See also St. 1895,

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c. 234, § 2. The plaintiffs were not the prevailing party, and there is no statute under which such facts properly can be presented in a mere motion after the entry of a final judgment. To give the application effect at all it must be deemed a petition to vacate the judgment, as the Superior Court seems to have considered it in each of the orders made upon it. It was somewhat informal, and there may have been uncertainty in the minds of some of the parties in regard to the precise nature of the proceeding; but, in view of all the circumstances, we are inclined to construe the application as a petition to vacate the judgment under the statute.

Upon such an application, in ordinary cases, a bond must be given under § 17 before the judgment can be vacated. The exception to this general rule is stated in § 18, and this case is not within it. It seems, therefore, that there was an error of law in making the final order without the filing of a bond. For this reason, the order must be set aside, the judgment reversed, and the petition remanded to the Superior Court for further proceedings.

As the case is not properly before us on the merits, we cannot consider the question as to interest which has been argued by counsel.

Judgment reversed; order set aside.

A. E. Denison & W. S. Campbell, for the defendant.

F. H. Williams & F. M. Copeland, for the plaintiffs.

ALEXIS MENAGE *vs.* MAX ROSENTHAL.

Suffolk. November 10, 1904. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Contract, Construction. *Words*, "Draw."

If a manufacturer of goods employs a travelling salesman for one year under an agreement by which the manufacturer agrees to pay the salesman at the end of the agreement a certain percentage on net sales of all goods and a certain other percentage on the net profits of the manufacturer's business, and that in the

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meantime the salesman is to be allowed "to draw for his maintenance and support during the term of this agreement, a sum equal to $100 per week", in addition to travelling expenses, which is to be deducted from the sum the salesman shall be found to be entitled to at the termination of the agreement, this does not guarantee to the salesman on final settlement the sum of $100 per week during the continuance of the agreement.

CONTRACT for alleged breach of an agreement in writing to employ the plaintiff as a travelling salesman for one year from January 1, 1896, the contract to continue for another year unless notice of termination should be given by one of the parties, the second count, mentioned in the next to the last paragraph of the opinion, alleging that the defendant on October 14, 1896, wrongfully discharged the plaintiff and wholly refused to perform the contract. Writ in the Municipal Court of the City of Boston dated February 5, 1897.

On appeal to the Superior Court the case at first was tried before *Bond*, J. The jury returned a verdict for the defendant, and exceptions alleged by the plaintiff were sustained by this court in a decision reported in 175 Mass. 358. The case then was tried before *Bell*, J. The material portion of the agreement is quoted in the first paragraph of the opinion.

The plaintiff contended that under the contract he was to be paid for his maintenance and support the sum of $100 per week during the term of his employment without reference to the amount of commissions which sales by the plaintiff might entitle him to receive, and that this should be the measure of damages for the breach of the contract. The amount of sales by the plaintiff before October 14, 1896, was about $30,000, and no sales were made by him for which he could have credit after that date. His commissions until his discharge and his share of the net profits during the term of the contract were not in excess of the amount recovered by and paid to him on a judgment in a former action brought by him on October 14, 1896.

The judge, without expressing any opinion as to the proper construction of the contract, stated that he would report the case, and that it should be tried for the purpose of having all questions of fact in the case determined by the jury, upon the theory of the plaintiff that he was entitled to compensation if he had performed his contract or been ready to perform it, and of having the damages assessed.

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Accordingly the judge submitted the case to the jury generally upon the question whether there had been a breach of the contract by the defendant for which the plaintiff was entitled to damages, and whether the plaintiff had performed his part of the contract or had been ready to perform it, instructing the jury that if the defendant violated the contract and the plaintiff did not, the plaintiff might recover damages at the rate of $100 a week, less any sum which the plaintiff could have earned in his trade by reasonable diligence in getting another job. The jury returned a verdict for the plaintiff in the sum of $1,400.77; and the judge reported the case for determination by this court.

If the contract gave the plaintiff the right to receive the sum of $100 for each week without regard to commissions earned and percentage of profits, if any, then the verdict was to stand, but if the contract was to be construed as fixing the plaintiff's compensation by the amount of commissions earned and the share of the profits, if any, due him, as named in the contract, then the verdict was to be set aside and such disposition of the case was to be made as to the court might seem meet.

A. Lincoln, for the defendant.

E. N. Hill, for the plaintiff.

MORTON, J. This is an action for the breach of a written agreement entered into between the plaintiff and the defendant wherein the latter agreed to employ the plaintiff as salesman for one year beginning January 1, 1896. The plaintiff was discharged by the defendant on October 14, 1896, and the defendant refused to go on with the contract, and thereupon this action was brought. The case turns on the construction to be given to the agreement, the principal clause of which, so far as relates to the question now before us, is as follows: "3. The party of the first part [the defendant] hereby agrees to pay to the party of the second part [the plaintiff] . . . a sum equal to seven and one half (7 1-2%) per cent of all the net sales of goods made by the party of the second part, and does hereby allow and permit the party of the second part to draw for his maintenance and support during the term of this agreement, a sum equal to one hundred ($100.00) dollars per week and such expenses as he may incur in travelling whilst in the performance of his duty as such salesman; and also in addition thereto ten

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(10) per cent of the net profits that the party of the first part may realize in his said business, it being understood, however, that the commissions allowed by the party of the first part to the party of the second part and the ten (10) per cent of the net profits as hereinabove referred to, are not to be drawn by the party of the second part until the end or termination of this agreement; excepting the sum which the party of the second part is hereby allowed to draw for his individual maintenance and support and for travelling expenses, which last named sum, to wit, the sum allowed for maintenance and support and travelling expenses shall be deducted from the amount of commissions and the ten per cent above referred to which at the termination of this agreement it shall be found the party of the second part is entitled to receive from the party of the first part."

The plaintiff contends that, according to the terms of the contract, he is entitled to $100 a week during the year for which it was to continue, without regard to the percentages on the sales and profits. In other words, his contention is, in substance, that the contract amounted to a guaranty of $100 a week for his support and maintenance during the year which it covered. The defendant contends that the $100 per week is to be regarded as an advance on account of the percentages to which it might be found that the plaintiff was entitled at the termination of the agreement. We think that this is the true construction. The agreement provides in substance, as we construe it, that the defendant shall pay the plaintiff for the services to be rendered by him a sum equal to seven and a half per cent on the net sales of all goods made by the plaintiff and ten per cent on the net profits of the defendant's business. The sum thus agreed upon is to be paid at the end of the agreement and in the meantime the plaintiff is to be allowed and permitted to draw for his maintenance and support a sum equal to $100 per week, which is to be deducted from the sum which it shall be found the plaintiff is entitled to receive at the termination of the agreement. The $100 per week is spoken of as something to be drawn by the plaintiff and also as something which the defendant is to allow and permit him to draw, expressions which are inconsistent with anything in the nature of a guaranty. It is true that there is a provision that the seven and one half

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and the ten per cent are not to be "drawn" by the plaintiff till the end of the agreement. But manifestly this relates to what will then be due to the plaintiff and has no tendency to show that the $100 per week is payable absolutely.

The defendant also contends that the plaintiff is not entitled to recover upon his declaration. Assuming, without deciding, that the question of pleading is properly before us, we think that the action can be maintained upon the second count. A right of action accrued to the plaintiff as soon as he was discharged by the defendant and the defendant refused to go on with the contract. In this respect the case differs from *Porter* v. *American Legion of Honor*, 183 Mass. 326, relied on by the defendant.

The jury found for the plaintiff under instructions which permitted them to find that he was entitled under the agreement to $100 per week absolutely for the rest of the term, less any sum which he could have earned in his trade by getting another job. This was error, and the result is that according to the terms of the report the verdict must be set aside and a new trial granted.

So ordered.

ALBERT F. O'CALLAGHAN & others *vs.* BENJAMIN LANCY.

Suffolk. November 29, 1904. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Tax, Sale, redemption. *Equity Jurisdiction*, Mistake.

A bill in equity to redeem land from a tax sale within five years may be maintained under R. L. c. 13, § 75, if it appears that the plaintiff acted in the erroneous belief that the taxes on his property were being paid as they came due from the rent of a certain store and was ignorant of the advertisement of the property for sale and of the sale itself.

BILL IN EQUITY, filed in the Supreme Judicial Court on December 9, 1902, under R. L. c. 13, § 75, to redeem certain real estate numbered 301 on Bunker Hill Street in that part of Boston called Charlestown from a sale made on December 30, 1897,

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by the collector of taxes of the city of Boston for non-payment of taxes for the year 1896.

The case was heard by *Braley*, J., who made a decree that the plaintiffs or any of them might redeem the premises described in the bill on payment to the defendant or his attorney of record of the sum of $357.08, within sixty days from the entry of the decree, and that thereupon the defendant should execute and deliver to the plaintiffs a release of all title acquired under the tax deed or any claim acquired by payment of taxes assessed since that time. The defendant appealed to the full court. The justice made certain findings of fact, and also appointed a commissioner under Chancery Rule 35 to take the evidence to be reported to the full court.

W. O. Childs, for the defendant.

C. S. Tilden, for the plaintiffs.

BARKER, J. The statutory provisions under which the bill is brought have been held by this court to have been "enacted, not for the purpose of extending in every case the time of redemption from two to five years, but for the purpose of permitting the court to grant relief, at any time within five years from the taking or sale of the land, if the circumstances rendered it equitable." *O'Day* v. *Bowker*, 143 Mass. 59, 62, 63. *Widersum* v. *Bender*, 172 Mass. 436. One of the common grounds of relief in equity is that the party who seeks the aid of the court has acted under and suffered loss through mistake, that is through ignorance of a fact material to the transaction, or in an erroneous belief in the existence of material facts. See 20 Am. & Eng. Encyc. of Law, 807; Story Eq. Jur. § 110.

If the findings disclose one or more such mistakes on the part of the plaintiffs and if the findings are supported by the evidence the decree must stand.

We have examined the reported evidence and the findings. It is plain that the plaintiffs, if not intentionally misled by the defendant himself, acted in the erroneous belief that the taxes on their property were being paid, as they became due, through the O'Callaghan store from which came with great regularity the money which supported the family, and in ignorance of the advertisement of the property for sale and of its sale. We think the decree amply supported on the ground of mistake.

Decree affirmed

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WILLIAM T. WAY *vs.* ALFRED M. DAY & others.

Suffolk. November 30, 1904. — March 8, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Recognizance, Bail deposit. *Assignment*. *Equity Jurisdiction*.

A person making a deposit of bail money, in order that another person arrested on criminal process may be allowed to give his personal recognizance under R. L. c. 217, § 77, retains the general ownership in the money subject to the pledge under the statute, and the prisoner, after having been indicted and sentenced without making default on his recognizance, cannot make an assignment of the bail money which will be good against the depositor who owns it, however the title to the money may be regarded as between the Commonwealth and the prisoner.

Whether a court of equity can interfere with the disposition of bail money deposited in order that a person arrested on criminal process may be allowed to give his personal recognizance under R. L. c. 217, § 77, which by § 79 of the same chapter and St. 1903, c. 236, is subject to the order of the court in which the money is deposited, *quære*.

Whether a court in which bail money is deposited under R. L. c. 217, § 77, to enable a person arrested on criminal process to give his personal recognizance, after the prisoner has been sentenced without making default on his recognizance can order the money to be paid to any person other than the prisoner "or his order" as directed by R. L. c. 217, § 79, St. 1903, c. 236, *quære*.

BILL IN EQUITY, filed March 3, 1904, against Alfred M. Day, Laurin Greer, and John P. Manning, clerk of the Superior Court, Criminal, for the County of Suffolk, to enforce an assignment by the defendant Day to the plaintiff of the sum of $800 deposited with the defendant Manning under the provisions of R. L. c. 217, § 77.

In the Superior Court *Sheldon*, J. made a report of the facts found by him, and made a decree dismissing the bill, with separate costs to the defendants Manning and Greer. The plaintiff appealed.

W. B. Orcutt, for the plaintiff.

V. Goldthwaite, for the defendants Day and Greer.

HAMMOND, J. The statute under which this money was deposited provides that "If a person who is arrested on criminal process has been ordered to recognize with surety or sureties for his appearance before any court, . . . he may, instead of giving

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surety or sureties, at any time give his personal recognizance, and deposit the amount of the bail which he is ordered to furnish with the court, trial justice or magistrate authorized by law to take such recognizance who shall give him a certificate thereof, and upon delivering said certificate to the officer in whose custody he is, he shall be released"; and that this money shall be forthwith deposited "with the clerk of the court or with the trial justice before whom such person was recognized to appear." R. L. c. 217, § 77.

Subsequent sections of the same chapter provide (§ 78) that upon default of the defendant the court before whom the defendant was recognized to appear may order the money to be paid to the county treasurer; and further (§ 79) (St. 1903, c. 236) that the defendant may surrender himself at any time before default and the court shall thereupon order the money so deposited to be returned to him or his order.

In a word the money is placed in the possession and control of the court, with the power in the court to order it to be paid to the county treasurer in case of default, and with direction to the court in case of a surrender before default to return it to the accused or his order.

It appears that at the request of a brother of the defendant Day this money was deposited by the defendant Greer with the bail commissioner, who thereupon took Day's "personal recognizance, and returned the same to and deposited said money in lieu of sureties with the defendant Manning, as clerk of the Superior Criminal Court." Day made no default, subsequently was indicted and sentenced, and it thereupon became the duty of the court to order the money to be paid to him or his order. The court has made no such order, nor does it appear that it has been requested by the plaintiff to make any.

As to the ownership of the money, the judge before whom the present case was heard found that the defendant "Greer did not lend said $800 either to the defendant Day or to Charles H. Day, but it was and always has been the understanding of all of them that Greer retained ownership thereof in himself, though consenting that it should be held as security for the defendant Day's recognizance; and this sum of $800 is and always has been Greer's property and is not and never has been the property of

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the defendant Day; though this fact is not shown to have been known to the plaintiff, who had been told only that Greer had put up the money"; and having so found he ruled "that, while Greer cannot claim against the Commonwealth that this money belongs to him and not to Day, yet this rule does not protect the plaintiff or give to him any rights against the real owner of the fund and that for this sole reason the bill cannot be maintained."

We are of opinion that this ruling was correct. Even if it be assumed that a court of equity can interfere with the power and duty of the court in which the money is deposited and direct to whom it shall be paid, — an assumption attended with great, if not insuperable difficulties, — and even if it be further assumed that as between the Commonwealth and Day the money must be regarded as belonging to Day and not to Greer, and, still further, that the court in which it is deposited has no power to order it to be paid to any other person than to Day or his order (see *Edelsten* v. *Adams*, 8 Taunt. 557; *Douglass* v. *Stanbrough*, 3 A. & E. 316; *Salter* v. *Weiner*, 6 Abb. Pr. 191; *People* v. *Laidlaw*, 102 N. Y. 588), still it is plain that the money being in fact Greer's and not Day's, and having been pledged only for a certain purpose, Day had no authority express or implied to divert it to a different purpose. In equity and good conscience the money should go to Greer, and as against him the assignment by Day to the plaintiff must be regarded as invalid to convey any interest in or right to the fund, and equity will not lend its aid to enable him to get possession of it.

Decree affirmed.

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WILLIAM HAGERTY *vs.* OWEN McGOVERN.

Suffolk. December 2, 1904. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Nuisance. Equity Jurisdiction.

The owner of a house and lot on a city street cannot maintain a bill in equity against the owner of the adjoining lot to prevent his building the wooden wall of a house within three feet of the boundary line in violation of a city ordinance.

BILL IN EQUITY, filed November 25, 1901, and amended March 10, 1902, by the owner of a house and lot numbered 42 on Francis Street in Boston to restrain the owner of the adjacent lot, No. 40 Francis Street, from building a house on it with a wooden wall within three feet of the boundary line between the lots of the plaintiff and the defendant.

The ordinance referred to is as follows, Revised Ordinances of Boston, c. 45, § 34: "Every such wooden building hereafter erected or altered to be used as a dwelling house, shall not be more than forty-five feet in height above the highest street level of the principal front, nor shall any external wall thereof, unless made of brick at least twelve inches thick carried twelve inches above the roof and covered with metallic covering, or with the roof laid and embedded in mortar on such wall, be nearer than three feet to the line of any adjoining lot."

The defendant demurred to the bill as amended. In the Superior Court *Bishop*, J. made a decree sustaining the demurrer and dismissing the bill. The plaintiff appealed.

S. L. Whipple, W. R. Sears & H. W. Oyden, for the plaintiff.

J. F. Sweeney, for the defendant.

BARKER, J. The wooden side wall of the defendant's house had no greater tendency to cause a lack of air or light at the plaintiff's premises, or to confine upon them or to in any way cause there noxious odors and disturbing noises than a wall of brick or stone which the defendant lawfully might have put where he did put the wooden wall. The wooden wall would be less of a protection in case of fire, and even might be a source of danger in that respect. But the use of land for building is one of the in-

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cidents of ownership. The erection upon it of structures which in themselves are not noxious or unusually dangerous is not a use in violation of the private rights of an adjoining owner, even if in some degree the enjoyment of the adjacent land is made less complete or beneficial than if the land were bare. The breach of the ordinance by the defendant is not an invasion of the plaintiff's private right. All the injurious results of the erection of the defendant's building come not from his violation of the ordinance, but from the use of his land for building. The plaintiff shows no peculiar damage due to the breach of the ordinance, and no right to have private relief because of its violation. See *Jenks* v. *Williams*, 115 Mass. 217.

Decree affirmed.

CHARLES L. TODD & another, administrators, *vs.* GEORGE G. TARBELL & others.

Middlesex. December 5, 6, 1904. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Devise and Legacy, Construction.

A testator after giving to his wife the income of all the residue of his estate, with the right to use the principal, provided as follows: "and upon the decease of my wife, so much of said residue as may then remain is to be equally divided between my two sons. — and in case of either of my sons shall die, during the lifetime of their Mother, leaving no issue, then the whole of said residue or remainder is to go to the survivor of them, and in case both of my sons shall die during the lifetime of their mother — then she is to dispose of said estate, as she shall think best. —" The two sons survived their father and both died before their mother, one of them leaving issue. Their mother died testate, and by the terms of her will disposed of the whole residue of her husband's estate under the above testamentary power, although the issue of one of her deceased sons survived her. *Held*, that the power was exercised properly and disposed of the whole property, the power of disposition over the whole property passing to the widow on the death of her two sons although one of them left issue, there being nothing to justify the court in adding the words "without issue" to the contingency named in the second gift over.

BILL IN EQUITY, filed March 1, 1904, by the administrators *de bonis non* with the will annexed of the estate of Charles L. Tarbell, late of Lincoln, for instructions.

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The case came on to be heard before *Morton*, J., who reserved it upon the bill and answers, and a stipulation of the parties that all the allegations of fact in the bill and answers were admitted to be true, for determination by the full court, such disposition to be made thereof as to the court should seem meet.

The will of Charles L. Tarbell, omitting the introductory and the attesting clauses and the signatures of the testator and the witnesses, was as follows:

"Iprimis I give to my sons, George G. and Charles F. Tarbell, the sum of five hundred dollars each, to be paid to them in one year after my decease.

"Item I give to my wife, Martha E. Tarbell, the Income or improvement of all the rest or residue of my estate, during her life, and in case the interest or income of said estate is not sufficient for her comfortable support and maintainance during her life, then she is to have so much as may be necessary for said support, out of the principal, that is, out of said residue or remainder; — and upon the decease of my wife, so much of said residue as may then remain is to be equally divided between my two sons. — and in case of either of my sons shall die, during the lifetime of their Mother, leaving no issue, then the whole of said residue or remainder is to go to the survivor of them, and in case both of my sons shall die during the lifetime of their mother — then she is to dispose of said estate, as she shall think best. —

"Lastly — I hereby nominate and appoint my son, George G. Tarbell, sole Executor of this my last will and testament — and request that he may be exempted from giving any sureties or surety on his bond as Executor."

Charles L. Tarbell died on December 24, 1889, leaving a widow, Martha E. Tarbell, and two sons, George G. Tarbell and Charles F. Tarbell. Charles F. Tarbell died intestate, on October 31, 1891, leaving a widow, Ida A. Tarbell, and two children, Sarah A. Tarbell and George G. Tarbell. George G. Tarbell (senior) died, testate, on December 28, 1900, leaving no issue. Martha E. Tarbell, widow of Charles L. Tarbell, having outlived both of her sons, died on June 16, 1903, testate. She was survived by her grandchildren, Sarah A. Tarbell and George G. Tarbell, children of her son Charles F. Tarbell as above stated.

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E. D. Fullerton, for the administrators, stated the case.

W. A. Knowlton, for the guardian *ad litem* of George G. and Sarah A. Tarbell.

H. D. Tudor, for Cornelius Fiske and Amanda Fiske.

R. L. Robbins, for the beneficiaries under the will of Martha E. Tarbell.

LORING, J. We are asked by the children of Charles F. Tarbell to supply the words "without issue" in the second gift over, mainly on the authority of *Abbott* v. *Middleton*, 21 Beav. 143; 7 H. L. Cas. 68. That was a case where, after setting apart funds to provide for an annuity to his widow, the testator directed the interest to be paid to his son for life, and on his demise the principal to become the property of the son's children in such sums as his son should by will direct; "but in case of my son dying before his mother," the principal sum was to be divided between the children of two deceased daughters, and the children, if any, of a living daughter. The Master of the Rolls supplied the words "without issue" in the gift over, and that decision stood on appeal, the House of Lords being equally divided. That the opinion expressed by Lord Brougham, who was not present at a second argument ordered to be made in the case, is not to be counted in spite of what is said in 7 H. L. Cas. 91, see Blackburn, J. in *Rhodes* v. *Rhodes*, 7 App. Cas. 192, 204.

Although the four lords who took part in the decision reached opposite results, they were agreed as to the principle to be applied. The principle on which they were agreed was put by Lord Cranworth in these words: "Where by acting on one interpretation of the words used we are driven to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable." This statement of the law has been subsequently referred to

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with approval. See *Gordon* v. *Gordon*, L. R. 5 H. L. 254, 284; *Bathurst* v. *Errington*, 2 App. Cas. 698, 709, 721, 722; *Rhodes* v. *Rhodes*, 7 App. Cas. 192, 204, 205.

Lord Chelmsford, then the Lord Chancellor, and Lord St. Leonards were in favor of the decree below, on the ground that a general intention could be gathered from the rest of the will not to disinherit the children of the son, to whom the fund previously had been given on the death of their father; and for that reason the words "without issue" were to be supplied in the gift over. Lord Cranworth and Lord Wensleydale, on the other hand, came to the opposite conclusion on the ground that the intention of a testator is to be ascertained by the meaning of the words used by him in his will, and that in the case before them that resolved itself into ascertaining the meaning of the words of the gift over; that the words of the gift over were not ambiguous; that by it the previous gift to the children was divested; and that it was not permissible to look at the rest of the will to discover a general intention for the purpose of overriding the unambiguous words of the gift over by inserting therein the words "without issue."

In the case at bar, however, there is no previous gift to the children of the sons. In the case at bar the previous gift was to the sons of the testator, not to the children of the testator's son, as was the case in *Abbott* v. *Middleton*. The intention of the testator here seems to have been not to give the estate to his grandchildren in any event. If a grandchild's father was alive when the testator's widow died the father was to have the property. If a grandchild's father was not alive then, the widow was to have the disposition of the property as donee of a power of appointment by will. In either event a grandchild was likely to get its share of the property from the father or under the grandmother's will. But in neither event is there a gift to a grandchild. The analogy of *Abbott* v. *Middleton* fails.

The case of *Weston* v. *Weston*, 125 Mass. 268, also relied on by the children of Charles F. Tarbell, is not a case where words were supplied, but a case where the words if "both survive my said wife" were held to qualify "in equal shares."

The language of the gift over in the case at bar is not ambiguous. By it the previous gift to the sons was divested, and

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the words in question cannot be supplied. See in this connection *Child* v. *Child*, 185 Mass. 376; *Boston Safe Deposit & Trust Co.* v. *Buffum*, 186 Mass. 242. See also *Brown* v. *Farmer*, 184 Mass. 136, 138, 139.

Decree accordingly.

The order contained in the rescript was as follows:

Let a decree be entered directing the plaintiffs as administrators with the will annexed of the estate of Charles L. Tarbell to pay over the property now in their hands as such administrators to Charles L. Todd, as he is executor of the last will and testament of Martha E. Tarbell. Costs to be allowed out of the fund as between solicitor and client.

JAMES E. McCABE *vs.* INHABITANTS OF WHITMAN.

Plymouth. January 3, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Way, Defect in highway. *Practice, Civil*, Exceptions.

In an action for injuries incurred in midwinter from an alleged defect in a highway, the judge gave an instruction quoted from the charge to the jury in *Bailey* v. *Cambridge*, 174 Mass. 188, as follows: "You must find, in order to entitle the plaintiff to recover, and you must find it by a fair preponderance of the evidence on the part of the plaintiff, that it was not reasonably safe and convenient for public travel, independently of the ice and snow that was upon it." *Held*, that this gave in substance a ruling which had been requested by the defendant, the court making no comment on the correctness of the proposition stated.

An excepting party, who has not excepted to the judge's charge, on the argument of exceptions to the refusal of his requests for instructions cannot complain of a sentence used by the judge in his charge.

TORT for injuries incurred on the night of January 13, 1903, from an alleged defect in a sidewalk of a public way leading from Washington Street to South Avenue in the town of Whitman and called Park Avenue. Writ dated March 3, 1903.

At the trial in the Superior Court before *Holmes*, J. the jury returned a verdict for the plaintiff in the sum of $100; and the defendant alleged exceptions to the refusal of the judge to make certain rulings requested by it. The first ruling requested by

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the defendant which is held by the court to have been given in substance was as follows: "The plaintiff cannot recover unless the jury find that, independently of any ice or snow, the way was defective, and this defect was the cause of the injury to the plaintiff."

E. O. Achorn, for the defendant.

W. J. Coughlan & J. J. Geogan, for the plaintiff.

LORING, J. 1. We are of opinion that the first ruling requested was given in substance in these words: "You must find, in order to entitle the plaintiff to recover, and you must find it by a fair preponderance of the evidence on the part of the plaintiff, that it was not reasonably safe and convenient for public travel, independently of the ice and snow that was upon it." These words are found in a part of the charge in *Bailey* v. *Cambridge*, 174 Mass. 188, read to the jury by the presiding judge in the case at bar, as a correct statement of the law.

2. No exception was taken to the charge. For that reason it is not open to the defendant to complain of the sentence which it now complains of, namely, "But if there was a defective condition there when the ground was bare, clear of snow and ice, and the snow and ice upon it at the time of the alleged injury created a condition which contributed to the defective condition already there to cause the plaintiff to meet with the accident, then the town would be liable if the plaintiff was in the exercise of due care and the condition was such as constituted a defect, both combined."

3. The ground on which the defendant contends that it was entitled to a verdict as matter of law is that the depression, if any, was a part of the gutter outside of the sidewalk across which the plaintiff was walking. But the plaintiff testified that he fell into the depression when walking across the sidewalk; another of his witnesses testified that "there was a depression that extended almost to the inside of the sidewalk," and another that the "gully was about three or four feet long on the centre of the walk."

Exceptions overruled.

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HOWARD DESSEAU *vs.* AUGUSTUS L. HOLMES & another.

Suffolk. January 11, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Contract, Validity. *Sale*, Conditional.

A contract made in advance by a purchaser under a contract of conditional sale to waive his right to a demand in writing and an itemized account and his rights in regard to redemption and sale given by R. L. c. 198, § 13, is void as against public policy.

TORT for the alleged conversion of a couch. Writ in the Municipal Court of the City of Boston dated November 7, 1903

On appeal to the Superior Court the case was heard on an agreed statement of facts by *Mason*, C. J., without a jury. It appeared that on August 16, 1903, the plaintiff bought of the defendants the couch in question under a contract of conditional sale dated August 10, 1903, and agreed to pay for it the sum of $31.50; that on the delivery of the couch to the plaintiff he executed and delivered to the defendants the following agreement:

"Received of Holmes, Luce & Co., a true copy of the above lease No. 73653, the conditions of said lease having been fully understood by me before signing, and the said Holmes, Luce & Co., not agreeing to accept the above lease No. 73653, and deliver the articles named therein, except upon the execution of the following agreement by me: Wherefore, in consideration of the delivery to me of the goods named in said lease, I do hereby for myself, my heirs and assigns, agree with the said Holmes, Luce & Co., that upon the breach by me of any of the conditions of said lease, to permit said Holmes, Luce & Co., their agents or representatives, to take possession of the property mentioned in said lease, and without furnishing me with an itemized statement of the amount due upon said lease, and I agree to waive and do hereby, for myself, my heirs and my assigns, waive all rights of every kind which I, or they have or may have, to be given or to receive notice of any kind, or any itemized statement, particularly waiving all rights which I, or

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they may have under section 13, chapter 198, of the Revised Laws of Massachusetts.

"Witness my hand and seal this tenth day of August, A. D., 1903. Howard L. Desseau."

It further appeared, that the plaintiff failed to make the payments required by the terms of the contract, and that the defendants took and carried away the couch without furnishing the plaintiff with an itemized statement of the amount due under the contract and without any notice to the plaintiff; and that $25 was a fair valuation of the couch at the time the defendants took possession of it.

The plaintiff requested the judge to rule that upon the evidence the plaintiff was entitled to a finding and to judgment. The judge refused to rule as requested, and found for the defendants. The plaintiff alleged exceptions.

W. R. Buckminster, for the plaintiff.

J. E. Crowley, for the defendants.

KNOWLTON, C. J. The defendants sold to the plaintiff a couch, by a conditional sale in the form of an instrument in writing called a lease, which provided for payments of $1 per week until the sum of $31.50, with interest, should be paid in all, at which time the property was to pass to the plaintiff. This writing purported to authorize the defendants to take possession of the property at any time, for a failure to make the prescribed payments, and afterwards to hold it absolutely. Similar contracts have been made for many years, and in the year 1881 the Legislature passed an act (St. 1881, c. 222) giving purchasers in the future, under such contracts, a right of redemption after default in payment, notwithstanding the provision in the writing that their rights should be lost by their neglect. Additional enactments have since been made, from time to time, for the extension and preservation of this right, all of which appear in substance in the R. L. c. 198, §§ 11, 12, 13. See Sts. 1884, c. 313; 1892, c. 411; 1898, c. 545.

As a part of the transaction of purchase, the plaintiff executed a separate instrument in which he undertook to waive all his rights under the R. L. c. 198, § 13, and to authorize the defendants, upon his failure to make payments as agreed, to take immediate possession of the property without giving him

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an itemized statement of the amount due upon the lease, and to hold it free from any right of redemption. The only question in the case is whether this instrument is binding upon the plaintiff.

It is elementary law that an agreement to waive the right in equity to redeem a mortgage, made by a mortgagor at the time of executing the mortgage, is void as against public policy. Story Eq. Jur. § 1019. *Bayley* v. *Bailey*, 5 Gray, 505, 510. *Waters* v. *Randall*, 6 Met. 479, 484. The reason for the rule is that improvident persons, in straits to obtain money, would be likely to make contracts, the literal enforcement of which would work great hardship upon them, to the detriment of the public as well as themselves. Referring to the civil law, Judge Story says of an agreement that there shall be no right of redemption under a mortgage, "Such a stipulation was held void, as being inhuman and unjust." § 1009. The reasons for this rule in reference to common mortgages are still stronger in the application of it to conditional sales of personal property, which are made so commonly by shopkeepers in supplying householders of small means with furniture and other similar articles. The statutes referred to evidently were enacted for the protection of such persons. It is very plain that the Legislature intended to say that the usual provisions for immediate forfeiture in such contracts should be ineffectual and void in contracts made after the enactment of the statute. It cannot be that the same provisions embodied in a separate writing, made at the same time as the conditional sale, can have a different effect.

In *Corey* v. *Griffin*, 181 Mass. 229, it was held, in accordance with the intimation in *Wall* v. *Metropolitan Stock Exchange*, 168 Mass. 282, 284, that a contract not to sue under the St. 1890, c. 437, made in advance by one about to open an account for the purchase and sale of stocks, bonds and other securities, is void as against public policy. As the statute now in question rests upon grounds of public policy, it is not in the power of one who may be directly affected by it to contract in advance that it may be disregarded.

Exceptions sustained.

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PHILIP G. PEABODY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. January 12, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Evidence, Of value of real estate, remoteness. *Damages. Interest.*

On the question of the depreciation of real estate owing to a change of grade, what evidence is admissible to show the market value of the property before and after the act affecting its value, depends largely on the circumstances of the particular case, and to a great extent must be left to the discretion of the presiding judge.

In an action of tort for injury to the plaintiff's real estate by a change of grade in the street on which it is situated made by a railroad company as an approach to a new station without authority, evidence of the price paid by the plaintiff for the property somewhat more than a year after the change was known to be contemplated and less than two years before the work was begun and of the price at which the plaintiff sold the property within three years after the work was completed, and also of the sum for which the property had been rented about thirteen months before the plaintiff bought it, were held not to be so remote in point of time that there was error as matter of law in their admission to show deterioration of the plaintiff's property by reason of the acts of the defendant.

In an action of tort for injury to the plaintiff's real estate by a change of grade in the street on which it is situated made by a railroad company as an approach to a new station without authority, if the plaintiff, instead of bringing his action when the acts of the defendant causing the injury were completed, has by reason of a mistake of remedy delayed the bringing of the action for nearly three years, the jury in assessing the damages may add to the damages for the injury to the property at the time of the completion of the acts of the defendant an additional sum computed as interest at the legal or any reasonable rate as compensation for the delay to which the plaintiff has been subjected.

TORT for injury to certain real estate of the plaintiff numbered 24 on Buckingham Street in Boston, alleged to have been caused by illegal acts of the defendant in raising the grade of that street without authority, assuming to act under the provisions of St. 1896, c. 516. Writ dated October 8, 1902.

At the trial in the Superior Court before *Wait*, J. the jury returned a verdict for the plaintiff, and assessed the damages in the sum of $1,800, with a statement that they included interest. The defendant alleged exceptions, raising the questions stated by the court.

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A. F. Clarke, for the defendant.

F. T. Benner, for the plaintiff.

BRALEY, J. This is an action of tort to recover damages to the plaintiff's property caused by the wrongful acts of the defendant between June 1 and October 1, 1899, in raising the grade of a part of Buckingham Street on which his premises abutted.

The work was performed in connection with the construction of the Back Bay station in the city of Boston under the provisions of St. 1896, c. 516, which authorized the Boston and Providence Railroad Corporation by the exercise of the right of eminent domain to take such lands, and make such changes in the public ways as might be required for this purpose, but the work of construction which followed was undertaken and completed by the defendant under an agreement made by it with the corporation.

In accordance with the provisions of the act a petition was brought by the plaintiff on December 21, 1899, against the corporation to recover damages caused by the changes in grade required by the taking, but it was held he was not entitled to recover because the acts of the defendant in obstructing the portion of the street opposite the plaintiff's estate were not authorized by statute, and he had mistaken his remedy. *Peabody* v. *Boston & Providence Railroad*, 181 Mass. 76.

After this decision he brought the present action, and, the plaintiff having obtained a verdict, the defendant brings the case before us on exceptions to the admission of certain evidence of the value of the plaintiff's property before and after the tortious acts complained of, and to the instructions given on the measure of damages.

There was evidence tending to prove that the windows in the basement story of the house which before the change were above the level of the sidewalk, and wholly unobstructed, were left partly below it by the new grade with open spaces protected by brick walls in front of and around this part of them. These changes not only shut off light from the rooms in the basement, but caused water from the surface of the street, and also snow and ice to accumulate in such quantities in these spaces as to percolate into the cellar, causing dampness, which was communicated to the rooms above. The ceilings and walls of the house

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were also affected and injured by the weight and pressure upon it caused by the accumulation of large piles of filling required for the embankment while the work was in progress, and by the embankment itself when completed.

The case thus presented is the ordinary one of decrease in value of real property brought about by a change of grade of a public way on which it abuts, although here the remedy takes the form of an action of tort rather than of a petition for the assessment of damages, and the plaintiff would be entitled to show the value of his property before the work was begun, and after it had been completed.

He purchased his estate on June 24, 1897, shortly after the statute was passed, and when by reason of the improvements contemplated it was anticipated that the value of property in the neighborhood would be enhanced, and there was a conflict of evidence whether any advance had taken place, and if so, whether it had been rapid. There also was evidence, given by the plaintiff without objection, of the rental value of the property at the time of purchase, and after the illegal filling in front of the premises, as well as of the difficulties that the plaintiff had encountered in getting tenants. Against the objection and subject to the exception of the defendant the plaintiff then was permitted to state the price he paid for the property, and the amount received at its sale on January 9, 1901, and to show by a witness the sum for which it had been rented in March, 1896.

It does not appear that there had been other sales of property in the vicinity during the time of his ownership, or prior to the plaintiff's purchase which could have been introduced, and the price paid, and the rental received furnished some evidence of the diminution in value of his estate, unless too remote in time.

But it often has been said that no positive rule can be formulated which will apply equally to all cases, and when questions of the depreciation of real estate are raised, that may be ascertained by comparison with the market value of the property both before and after it has been affected, the circumstances of the particular case must largely determine the admission of this line of evidence, which to a large degree must be left to the discretion of the presiding judge.

The sale to the plaintiff within slightly more than a year from

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the time when the changes in the vicinity contemplated by the statute were known, and within less than two years before the work was begun, and the sale by the plaintiff within three years after the work was completed, cannot be said as matter of law to be acts so remote in point of time as to be of no evidentiary value. Nor for the same reason was there an error of law in the admission of evidence of the rental value of the property, though the period covered was more than a year earlier than the date of the plaintiff's purchase. *Whitman* v. *Boston & Maine Railroad*, 7 Allen, 313, 318. *Ham* v. *Salem*, 100 Mass. 350. *Benham* v. *Dunbar*, 103 Mass. 365. *Chandler* v. *Jamaica Pond Aqueduct*, 122 Mass. 305. *Patch* v. *Boston*, 146 Mass. 52. *Pierce* v. *Boston*, 164 Mass. 92. *Lyman* v. *Boston*, 164 Mass. 99. *Bowditch* v. *Boston*, 164 Mass. 107. *Conness* v. *Commonwealth*, 184 Mass. 541, 544.

On the measure of damages the jury were instructed that if they found the amount of damages sustained by the plaintiff on December 21, 1899, when he brought his petition to be insufficient to fully indemnify him by reason of the delay, then they were at liberty to add interest at the legal rate upon the amount from this date to the date of their verdict. No exception was taken to the time during which interest should be reckoned, or the rate to be allowed, but the defendant contended, and now contends, that the plaintiff was not entitled to interest by way of damages.

Interest is generally allowed in actions of contract as compensation for the detention of money found to be due, although the amount to be recovered may remain unliquidated until ascertained by verdict. The time for which it shall be computed may depend on the terms of a contract, or on a demand previously made, otherwise it usually runs from the date of the writ.

It has been said that it is allowed as of right in trover, and actions for injury to or destruction of property, and also in awarding damages for land taken under the exercise of the right of eminent domain, when it is computed on the amount awarded from the date of the taking, which has usually been the time to which the rights of parties interested are brought for adjustment. *Frazer* v. *Bigelow Carpet Co.* 141 Mass. 126, 127. *Parks* v. *Boston*, 8 Pick. 218. *Hay* v. *Commonwealth*, 183 Mass. 294, 295.

When his cause of action accrued the plaintiff had a right to

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be fully recompensed whether he recovered under the statute or at common law, and if he then had sued out his writ instead of his complaint for damages an allowance of interest from that time to the date of the verdict on the amount found due would have made him whole. But he failed in his first suit, and then brought the present action, and if he is to be placed in the position which the law contemplates, the jury could consider this lapse of time in their assessment of damages.

The principal sum to be ascertained would be the damages directly resulting from the acts of the defendant, assessed as of the time of the completion of the act, or series of acts, which caused the injury, and if the jury found that this method of assessment would not give the plaintiff full compensation because of the delay to which he had been subjected, they might allow such additional sum computed as interest at the legal or any reasonable rate they found proper and necessary for this purpose, and these sums combined would make the amount of damages assessed by them. In making their award interest is not allowed as such for the detention of damages due and unpaid, but is awarded as additional damages so that the plaintiff can thus receive full indemnity for the wrong suffered. *Frazer* v. *Bigelow Carpet Co.*, *ubi supra*. *Ainsworth* v. *Lakin*, 180 Mass. 397, 402. *Atwood* v. *Boston Forwarding & Transfer Co.* 185 Mass. 557, 559.

Exceptions overruled.

THOMAS R. McCARTHY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 12, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Contributory, In driving.

If one driving on a quiet summer night in a heavy empty furniture wagon twenty-two or twenty-three feet long, with two horses going at a walk, is obliged on account of an obstruction on the right hand side of the street to cross the parallel tracks of a street railway to get to the left hand side of the street, and if there is a similar team ahead of him which crosses the tracks safely, and if,

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hearing no bell or other sound indicating the approach of a car, he starts diagonally across the tracks toward the left at an angle of forty-five degrees and, suddenly seeing a car coming rapidly around a curve on the farther track, strikes his horses "so as to clear it," because it is "too late to back up" and he has "to go ahead," and, if in attempting to do this his team is struck by the car and he sustains injuries, he can be found to be in the exercise of due care.

TORT, by an experienced driver forty years of age, for personal injuries from being run into by an electric car of the defendant while returning from Needham driving two horses in a heavy empty furniture wagon on Boylston Street in Brookline near the foot of Wright's Hill between ten and eleven o'clock on the evening of July 3, 1901. Writ dated July 5, 1901.

At the trial in the Superior Court before *Fox*, J. the defendant at the close of the evidence requested the judge to order a verdict for the defendant on the ground that the plaintiff had not shown that at the time of the happening of the accident he was in the exercise of due care. The judge refused to make this ruling, and the jury returned a verdict for the plaintiff in the sum of $7,000. The judge reported the case for determination by this court, with a stipulation of the parties, that if the evidence did not show that the plaintiff was entitled to go to the jury judgment should be entered for the defendant, and that if the plaintiff could recover upon the evidence judgment should be entered for the plaintiff upon the verdict.

G. H. Mellen, for the defendant.

A. S. Hayes, (*A. G. Sleeper* with him,) for the plaintiff.

KNOWLTON, C. J. The plaintiff was driving, upon Boylston Street in Brookline, toward Boston, on the night of July 3, 1901, a heavy, open, empty furniture wagon drawn by two horses, and as he approached Wright's Hill, on the right hand side of the two tracks of the electric railway, he saw lights and a barrier across that part of the street, in front of him, which made it necessary to cross over to the left hand side. The left hand side of the street and the portion on which the tracks were had been cut down and graded at that point, but the work had not been done on the right hand side. Just in front of him there was a curve in the street, and a slightly ascending grade as he went toward Boston, and the hill, which had not then been cut away, was very near the tracks on the right hand side, so that it was impossible to see the tracks for any considerable

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distance before him. He looked as he was about to pass over to the left, and neither saw nor heard any car. His horses were going at a walk, and a short distance in front of him was another wagon, similar to his, drawn by two horses, and occupied by two persons who were working for the same employer as the plaintiff. These two witnesses testified that when they were crossing the track they looked and listened, and obtained no intimation that a car was approaching, and that then, as they were passing along, the car came very rapidly over the hill, passed them, and almost immediately came into collision with the plaintiff. Both they and the plaintiff testified that they heard no bell or other sound indicating the approach of the car. The plaintiff was passing diagonally over the tracks, towards the left, at an angle of forty-five degrees. The car which collided with him was coming from before him, upon the track on his left, so that he was obliged to cross over both tracks to be out of its course. The plaintiff testified that it was a quiet summer night, that he was wide awake, that his hearing was good, that he could stop his horses very quickly, but that when he first saw the car he "struck the horses so as to clear it, because it was too late to back up, and he had to go ahead." The length of his team from the end of the pole in front, to the end of the wagon behind, was between twenty-two and twenty-three feet. The only question in the case is whether there was any evidence that the plaintiff was in the exercise of due care.

We are of opinion that the evidence presented a question of fact for the jury. With such a team, it would take considerable time to pass from the point of entrance upon the right hand track to a point beyond the line of the left hand track. In passing in the ordinary way, the plaintiff would all the time be going nearer the approaching car. Upon the evidence, we can well believe that only a very short time would elapse after the car came in sight around the curve beyond the hill, before it would be upon him. It was in the evening, there were no lights along the road, and there were woods at the right hand side of the hill. Although he said in one part of his testimony that he heard a noise, looked quick, and that the car was within six feet of him, the jury might well believe that it was impossible for him to estimate this distance with accuracy, and that his

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answer was only another way of saying that the car was close upon him. If the car was running very rapidly, as electric cars sometimes run upon suburban roads, it would be hardly more than an instant from the time it came within his line of vision before it would strike him. It cannot be said as a matter of law that the plaintiff was not in the exercise of due care. *Silva* v. *Boston Elevated Railway*, 183 Mass. 249. *Driscoll* v. *West End Street Railway*, 159 Mass. 142, 146.

Judgment on the verdict.

MARY MANNING *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 12, 1905. — March 8, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Practice, Civil, New trial. *Jury and Jurors. Rules of Court. Evidence*, Best and secondary.

On a motion for a new trial on the ground of the disqualification of a juror, if the affidavits aver that the disqualification was unknown to the party making the motion or his attorney before the juror was called, sworn or served, it may be found by the presiding judge in his discretion that neither the moving party nor his attorney was at fault in not making an objection to the juror before the verdict without its being shown that either of them made inquiry or investigation in regard to the juror before the trial.

On a motion by a street railway company, against which a verdict for personal injuries has been returned, for a new trial on the ground that one of the jurors rendering the verdict had been convicted of a scandalous crime and was not of good moral character, the facts, that this juror worked as a laborer upon the streets and in the yard of the railway company and that a witness in the case was at one time the foreman under whom he worked, do not show neglect on the part of the railway company or its attorney in failing to know the character of the juror before the trial.

Under Rule 81 of the Superior Court a judge of that court properly can hear a motion for a new trial on affidavits with or without oral testimony to support them.

Convictions of crime properly can be shown by docket entries if the records have not been extended.

On a motion for a new trial on the ground that one of the jurors returning the verdict had been convicted of a scandalous crime and was not of good moral character and that this was unknown to the party making the motion or his attorney until after the verdict, if it appears that in a period of several years there were eight criminal cases against the juror in the Superior Court in most of which he had been convicted and sentenced to imprisonment, and that in

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a period of twenty-three years there had been twenty-eight criminal prosecutions against him in the municipal court of the city in which he lived, in all of which he had been convicted and in many of which he had been sentenced to imprisonment, and that the latest sentence was imposed less than thirteen months before the trial, it is a proper exercise of judicial discretion for the presiding judge to find that the juror is not of good moral character and is disqualified, and to grant a new trial on this ground.

The decision of a trial judge in the proper exercise of his discretion on a motion for a new trial, that one of the jurors who returned the verdict was not of good moral character and was disqualified, and the granting of a new trial on this ground, are not subject to revision by this court.

TORT for personal injuries incurred while alighting from a car of the defendant at its transfer station at Dorchester Avenue in Boston. Writ dated January 22, 1903.

At the trial in the Superior Court before *Bell*, J., the jury returned a verdict for the plaintiff in the sum of $1,187. The defendant before judgment moved that the verdict be set aside on the grounds: 1. That it is against the evidence. 2. That it is against the weight of the evidence. 3. That the damages awarded are excessive. 4. For misconduct of one of the jurors. 5. A juror sitting on the above named case is not of good moral character. 6. That a juror sitting on the above named case was incompetent to sit, he having been convicted of a scandalous crime within the meaning of R. L. c. 176, § 8, and that such crime or reason for objection was unknown to the defendant or its attorney before the juror was called, sworn or served.

The judge denied the motion on the first four grounds, and on the fifth and sixth grounds granted the motion, and set aside the verdict. The plaintiff alleged exceptions to the refusal of the judge to make certain rulings requested by her at the hearing of the defendant's motion which are stated in the first paragraph of the opinion.

T. F. Waldron & James J. McCarthy, for the plaintiff. The presiding judge having refused to set aside the verdict as against the evidence or the weight of the evidence or because the damages awarded were excessive, and also having refused to set it aside on account of misconduct of the juror whom the judge found to be disqualified, a new trial should not have been granted on account of the disqualification, as it does not appear that any injustice was done or that the character of the juror, who was not guilty of misconduct during the trial, injuriously

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affected the defendant, citing among other cases *Commonwealth* v. *Wong Chung*, 186 Mass. 231, with other points which are mentioned in the opinion.

J. H. Baldwin, for the defendant.

KNOWLTON, C. J. The questions in this bill of exceptions arose upon a motion for a new trial, the important grounds of which were that a juror sitting in the case had been convicted of a scandalous crime and was not of good moral character. On these grounds the verdict was set aside. The plaintiff excepted to the refusal of the presiding judge to make four rulings requested, of which the first two were, in substance, that upon the motions filed and the affidavits in support thereof and the evidence the defendant was not entitled to a new trial. The third became immaterial, because the judge found in favor of the plaintiff upon the part of the motion to which it related. The fourth was that the defendant was not entitled to a new trial because the affidavits were filed too late. This exception was not argued.

1. The affidavits sufficiently averred that the disqualification of the juror was "unknown to the defendant or its attorney before the juror was called, sworn or served," and they warranted a finding that neither the defendant nor its attorney were in fault in not making an objection to him before the verdict. In appealing to the discretion of the court, it was not necessary to aver or prove that they made inquiry or investigation in regard to the juror before the trial. The facts that he had worked as a laborer upon the streets and in the yard for this defendant which employs many hundreds of men, and that a witness in the case was at one time the foreman under whom he worked, do not show neglect on the part of the defendant or its attorneys in failing to know his character.

2. It was proper, under Rule 41 of the Superior Court, for the judge to hear the motions on affidavits, with or without additional oral testimony. *Borley* v. *Allison*, 181 Mass. 246, 250. *Spaulding* v. *Knight*, 118 Mass. 528.

3. Convictions of crime properly could be shown by docket entries if the records had not been extended. *Commonwealth* v. *Meehan*, 170 Mass. 362, 363, 364. See *DeMontague* v. *Bacharach*, *ante*, 128, 133. Moreover these docket entries were received

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without objection, and it is now too late to raise a question in regard to them.

4. The records showed eight cases against the juror in the criminal sessions of the Superior Court for Suffolk County, covering several years, in most of which he had been convicted and sentenced to imprisonment. They also showed twenty-eight criminal prosecutions against him in the Municipal Court for the City of Boston, covering altogether a period of more than twenty-three years, in all of which he had been convicted, and in many of which he had been sentenced to imprisonment. The latest sentence to imprisonment was imposed less than thirteen months before this trial. The judge hardly could do otherwise than find that he was not of good moral character and was not qualified to serve as a juror.

Upon the facts of this case the defendant was not entitled as matter of law to have the verdict set aside; but the judge well might allow the motion, in the exercise of his discretion. *Commonwealth* v. *Wong Chung*, 186 Mass. 231. It was a case appealing with peculiar force to the discretion of the court, and the judge properly might find that the failure to have a panel of twelve qualified jurors, and the participation of this disqualified person in the decision of the case, were an injustice to the defendant which called for a new trial. His decision upon a question of this kind is not subject to revision in this court. *Shea* v. *Lawrence*, 1 Allen, 167. *Behan* v. *Williams*, 123 Mass. 366. *Commonwealth* v. *White*, 147 Mass. 76; *S. C.* 148 Mass. 429. *Perry* v. *Shedd*, 159 Mass. 200. *Freeman* v. *Boston*, 178 Mass. 403.

Exceptions overruled.

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LORAIN STEEL COMPANY *vs.* NORFOLK AND BRISTOL STREET RAILWAY COMPANY.

Norfolk. January 15, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Street Railway. Realty. Sale, Conditional. *Statute*, Construction. *Conversion. Damages. Words*, "Rolling stock."

The rails of a street railway company laid in a public street remain personal property, such a company having no interest in the soil of the street of which the rails on annexation can become a part.

One who sells trucks and motors to a street railway company under a contract of conditional sale, retaining the title until paid the price in full, has a good title against a purchaser of the property of the railway company at a foreclosure sale under a mortgage, although neither the mortgagee nor the purchaser had notice of the existence of the contract of conditional sale.

St. 1894, c. 326, (R. L. c. 111, § 75,) requiring the recording of conditional sales of "street railway rolling stock" in the office of the secretary of the Commonwealth, and that each engine or car shall be marked with the name of the vendor, does not apply to conditional sales of separate parts of cars, and one who sells trucks and motors to a street railway company, retaining the title until paid the price in full, so long as he remains unpaid has a good title against a purchaser of the property of the railway company at a foreclosure sale, although neither the mortgagee nor the purchaser had notice of the existence of the contract of conditional sale.

The use of a word in the title of a statute cannot be held to control or enlarge the words of the statute unless they are of doubtful meaning or ambiguous.

If, in reply to a demand of the owner of personal property for its delivery, the person having possession of the property denies having possession of any property belonging to the person making the demand and says that if he had any of the articles demanded he should refuse to deliver them, this is evidence of the exercise of dominion over the chattels, a denial of the demandor's title and an exclusion of the owner from possession, which can be found to be a conversion.

In an action for the conversion of chattels sold by the plaintiff under a contract by which he was to retain the title until the purchase money had been paid in full, the defendant cannot show in reduction of damages that the debt has been reduced by part payments so that the amount of the purchase money unpaid is less than the market value of the property converted. In such a case the ordinary rule applies that the plaintiff can recover the value of the property at the time of the conversion with interest from the date of the conversion to the date of the verdict.

TORT, for the alleged conversion of certain rails, trucks, motors and motor equipments named in a schedule attached to the declaration. Writ dated June 16, 1902.

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In the Superior Court the case was heard by *Pierce*, J., without a jury, upon the pleadings and an auditor's report. The plaintiff claimed title as assignee of the Johnson Company, a Massachusetts corporation, the unpaid vendor of the property named in the declaration under a contract of conditional sale to the Norfolk Southern Street Railway Company. The defendant claimed title through the purchaser of the property of the Norfolk Southern Street Railway Company at a foreclosure sale under a mortgage made by that company. The judge found the facts to be as found by the auditor, and upon those facts ruled *pro forma*, as matter of law, that the plaintiff was entitled to judgment in the sum of $20,000, and reported the case upon the pleadings and the facts as stated in the auditor's report for determination by this court. If the ruling was correct, judgment was to be entered for the plaintiff for the sum of $20,000. If the ruling was not correct, such judgment was to be entered as in the opinion of the court law and justice might require.

J. A. Stiles, for the plaintiff.

T. Hunt, for the defendant.

BRALEY, J. Whatever title the plaintiff has to the property described in the declaration is under a written agreement made by the Johnson Company with the Norfolk Southern Street Railway Company to furnish and equip with rails, trucks, motors and motor equipments the street railway now owned and operated by the defendant.

It was expressly provided by the contract, that the materials made or supplied for this purpose should remain the property of the vendor until payment therefor had been fully made.

This condition has not been complied with, and unless its performance has been waived, or the defendant has acquired a paramount title, the vendor, and hence the plaintiff which has succeeded to its rights, can maintain replevin to recover the rails and other articles delivered, or tort in the nature of trover for their conversion, even if the mortgagee, under whom the defendant claims, is found to be a purchaser for value and without notice. *Coggill* v. *Hartford & New Haven Railroad*, 3 Gray, 545, 547. *Deshon* v. *Bigelow*, 8 Gray, 159. *Armour* v. *Pecker*, 123 Mass. 143, 145. *Wentworth* v. *Woods Machine Co.* 163

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Mass. 28. *Cottrell & Sons Co.* v. *Carter, Rice, & Co.* 173 Mass. 155, 159, and cases cited. *Oliver Ditson Co.* v. *Bates*, 181 Mass. 455.

When the contract was entered into and the rails delivered it was understood that they were to be used in the construction of a track for the railway company, and an assent to such use by the vendor is implied from the very nature of the undertaking.

The track was built in the ordinary way by spiking the rails to sleepers laid within the location in the public ways granted to the company, and the defendant claims that such an annexation to the soil changed them from personalty to realty, and that an action will not lie for their conversion, as the plaintiff concedes that the American Loan and Trust Company, mortgagee in the mortgage, under the foreclosure of which the defendant claims its title, was ignorant of the conditional agreement.

In support of this contention it relies upon the settled rule that rails affixed in the usual manner to the roadbed of a railroad, if there is no agreement to the contrary, become part of the realty, and where there is such an agreement while the rails as between the seller and the railroad are personalty, if the roadbed is mortgaged to a mortgagee who has no notice of the agreement, and a foreclosure follows, the purchaser at the sale acquires a good title against the vendor. *Hunt* v. *Bay State Iron Co.* 97 Mass. 279. *Meagher* v. *Hayes*, 152 Mass. 228.

There is, however, a clear distinction between the nature of a right of way acquired by a railroad, and the ordinary grant of a location in the public ways to a street railway.

When not obtained by purchase a railroad corporation lays its rails on land in which a right in the nature of a permanent easement has been taken by the exercise of the delegated power of eminent domain, and thus an interest in real estate is acquired. *Barnes* v. *Boston & Maine Railroad*, 130 Mass. 388.

Within the limits of the layout it has the exclusive use and control of its roadway for all purposes authorized by its charter whether by a special act of incorporation, or under the general laws, subject only to such transitory invasions as may be required by a public emergency. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 104 Mass. 1. *Sweeney* v. *Boston &*

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Albany Railroad, 128 Mass. 5, 6. *Peirce* v. *Boston & Lowell Railroad*, 141 Mass. 481, 486.

And among the uses to which the location lawfully can be put are not only the construction and maintenance of the roadbed for the running of trains, but also of buildings necessary for carrying on the business of a common carrier as ordinarily conducted. *Peirce* v. *Boston & Lowell Railroad*, *ubi supra*.

The interest in land thus acquired and held takes on all of the characteristics of an estate in fee, with the single exception that where the taking is of an easement alone when the use ceases, the easement is at an end, and for this reason the general rule of the common law that what is annexed to the freehold by the owner becomes a part of the realty and passes by his deed is held applicable to conveyances made by a railroad of its right of way, roadbed and track. *Butler* v. *Page*, 7 Met. 40. *Hunt* v. *Bay State Iron Co.*, *ubi supra*.

But a street railway gains no easement or freehold interest in the soil, or exclusive control of the highways in which a location is granted to lay tracks and operate the road. The right conferred is to use the way within its location in common with others, and not exclusively for its own benefit. The whole way is as fully open to the lawful use of travellers after the road is built and in operation as before. *Middlesex Railroad* v. *Wakefield*, 103 Mass. 261. *Attorney General* v. *Metropolitan Railroad*, 125 Mass. 515, 517. *O'Brien* v. *Blue Hill Street Railway*, 186 Mass. 446, 447.

The use of a public way by a street railway is on the same footing as its use by other quasi public corporations for the laying of gas and water pipes, or the erection of poles and wires for the use of telegraph, telephone and electric light companies, that are all recognized as agencies for the larger accommodation of the public, under whose rights they are allowed to come in and participate in the enjoyment of an easement, payment for which has already been made. *New England Telephone & Telegraph Co.* v. *Boston Terminal Co.* 182 Mass. 397, 399, and cases cited.

It consequently has been held that gas and water pipes, manholes, conduits, wires and poles used for the transmission of intelligence, or supplying light by electricity, laid, placed or erected and maintained in public streets are personal property,

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which the owner may remove; but if not removed, and the street is appropriated for another public use which requires their removal, as no interest in land is taken, the owner is not entitled to damages. *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75. *Natick Gas Light Co.* v. *Natick*, 175 Mass. 246, 248. *Dudley* v. *Jamaica Pond Aqueduct*, 100 Mass. 183. *New England Telephone & Telegraph Co.* v. *Boston Terminal Co.*, *ubi supra*. *Boston Electric Light Co.* v. *Boston Terminal Co.* 184 Mass. 566.

The Norfolk Southern Street Railway Company had no authority to exercise the right of eminent domain; nor could it acquire title by purchase from the municipalities, as they were not authorized to sell or convey such an interest in the public ways; and the grant of a location only conferred a particular right under certain conditions to use a public easement in common with the public. It therefore gained no interest in the soil of the streets through which its track was laid. *Attorney General* v. *Metropolitan Railroad*, *ubi supra*. See also *Springfield* v. *Springfield Street Railway*, 182 Mass. 41, 47, 48.

The case of *Clemens Electrical Manuf. Co.* v. *Walton*, 173 Mass. 286, on which the defendant relies as sustaining a different view is not an authority in its favor, for it is expressly said in the opinion that it was not necessary to decide whether the rails became realty and followed the soil or remained personal property.

By the laying of the rails as a part of the defendant's track they did not lose their character of personalty and become realty by the fact of annexation because the defendant's predecessor had no land, or interest in land, of which they could form a part.

The conditional sale also included, and the plaintiff seeks to recover for the conversion of the trucks, motors and motor equipments.

But the defendant urgently insists that under St. 1894, c. 326, they must be classed as "street railway rolling stock", a conditional sale of which is not valid against a purchaser in good faith and without notice unless shown by a written instrument duly acknowledged and recorded in the office of the secretary of the Commonwealth.

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If the language employed is given its ordinary meaning, the rolling stock of street railways means cars fully equipped for the transportation of passengers, or of freight, so far as they are permitted to transport merchandise. The requirement that each car held by such a title shall be plainly marked on each side with the name of the vendor followed by the word "owner", applies to the completed vehicle, and not to the separate parts of trucks, motors, trolley pole, electric wiring and frame of the car of which the whole is composed. It is the car, and not its component parts, that is meant. *Commonwealth* v. *Boston Terminal Co.* 185 Mass. 281, 288.

The purpose of the statute is to afford protection to attaching creditors and purchasers of the character described in the act, and to prevent them from being misled to their injury by a debtor or vendor who has no title to property of this description though in its possession, and which it apparently owns, but where the ownership at the time is actually in another.

Nor is this meaning changed, as claimed by the defendant, by the use of the word "equipment" in the title of the act. The title of itself cannot be held to control or enlarge the words of the statute unless they are doubtful or ambiguous. *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344, 454, 455. *Proprietors of Mills* v. *Randolph*, 157 Mass. 345, 350. *United States* v. *Oregon & California Railroad*, 164 U. S. 526, 541. *Yazoo & Mississippi Valley Railroad* v. *Thomas*, 132 U. S. 174, 188.

The words "locomotive engine or car" which are used only once in the act must be held to refer to the words "railroad or street railway rolling stock," also used in the same section; and this construction appears in the last revision of the statutes. R. L. c. 111, § 75. This defence cannot be sustained.

No claim is made by the defendant that there was a waiver of title under the contract in favor of the mortgagee, for if the vendee was permitted by its provisions to mortgage the property to the Beacon Trust Company, this did not authorize a mortgage to the American Loan and Trust Company, to which the plaintiff never consented, and of which it had no notice until after the mortgage had been delivered and the bonds which it was given to secure had been issued.

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Having proved its title and right to possession, the plaintiff must also show a conversion of the property by the defendant.

Putting to one side the finding of the auditor that at the date of the defendant's purchase it knew, or was bound to know, the provisions of the conditional contract, his report shows that before the action was brought a demand was made on the defendant for the property as described in the declaration. The written reply by the defendant's president denied possession of any property belonging to the plaintiff, coupled with the statement that if it had "any of the articles . . . we should refuse to deliver them." This was evidence showing the exercise of dominion over the chattels, a denial of the plaintiff's title, and its exclusion from possession, and supports the finding of conversion. *Scollard* v. *Brooks*, 170 Mass. 445, 448. See also *Gilmore* v. *Newton*, 9 Allen, 171.

Even if the amount originally due has been reduced by payments so that the remainder of the unpaid purchase price is less than the market value of the property converted, yet the plaintiff has the general title, with the right to immediate possession by reason of the failure of the defendant to comply with the conditions of the contract.

If such right of possession had been asserted and the property retaken without suit, the vendee under a contract like this would have no cause of action to recover back money already paid, and where such a claim cannot be directly asserted, and is not actionable, it is not admissible in evidence either by way of mitigation of damages or to avoid circuity of action. *Angier* v. *Taunton Paper Manuf. Co.* 1 Gray, 621. *Buckmaster* v. *Smith*, 22 Vt. 203. *Brown* v. *Haynes*, 52 Maine, 578.

No sufficient reason appears why the usual rule as to damages recoverable in trover should not be followed, which allows to the plaintiff the market value of the property converted, with interest from the time of conversion to the date of the verdict, or of the finding by the court. *Greenfield Bank* v. *Leavitt*, 17 Pick. 1, 3. *Forbes* v. *Boston & Lowell Railroad*, 133 Mass. 154, 158. *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37, 41.

Inasmuch as the auditor under the agreement of the parties finds the market value of the rails to have been $20,000, of the trucks $1,350, and of the motors $450, amounting to the entire

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sum of $21,800, in accordance with the reservation in the report from the Superior Court the plaintiff is entitled to recover this amount, with interest on the value of the rails, trucks and motors, from June 10, 1902, the date of conversion, to the time of entering judgment.

So ordered.

HELENA J. QUINN *vs.* CITY OF CAMBRIDGE.

Middlesex. January 18, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Municipal Corporations. Cambridge. Tax, Assessments for benefits.

Under the charter of the city of Cambridge, St. 1891, c. 364, as amended by St. 1896, c. 178, an order of the city council if approved by the mayor takes effect from the date of his approval. Thus in case of an assessment for betterments from the widening of a street, which under Pub. Sts. c. 51, § 1, (R. L. c. 50, § 1,) must be made within two years from the passage of the original order, the period of two years is to be computed from the approval of the order by the mayor.

PETITION, filed July 21, 1903, for a writ of certiorari to quash an assessment upon certain real estate of the petitioner for alleged benefits from the laying out and widening of Belmont Street in Cambridge.

At the hearing before *Hammond*, J. the petitioner contended that the assessment was invalid because not made within two years of the order for the laying out and widening of the street. The justice ruled that the order was not complete until December 24, 1900, the date at which it was approved by the mayor, and, as the assessment was made within two years from that date, that it was valid. He made a decree that the petition be dismissed with costs; and the petitioner appealed.

F. J. Carney, for the petitioner.

G. A. A. Pevey, for the respondent.

KNOWLTON, C. J. This is a petition for a writ of certiorari to quash an assessment of betterments upon the estate of the petitioner, resulting from the widening of Belmont Street in Cambridge. The only ground of objection to the assessment is that it was not made within two years from the passage of the

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original order, as it should have been under the Pub. Sts. c. 51, § 1. The common council concurred with the board of aldermen in adopting the order on December 12, 1900, and the mayor approved it on December 24. The assessment was made on December 16, 1902, and the question is, whether the order widening the street took effect at the time of the vote of the common council in concurrence with the aldermen, or at the time of the approval by the mayor. The statute upon which the decision of the question depends, is the charter of the city of Cambridge, St. 1891, c. 364, as amended by the St. 1896, c. 173. Section 16 of the first mentioned act declares that "The city council shall have exclusive authority, subject to the veto power of the mayor, to lay out, alter, discontinue or fix the grade of any highway, street or town way," etc. This veto power is given in § 11 of the same chapter, which provides that, "Every ordinance, order, resolution or vote to which the concurrence of the board of aldermen and of the common council may be necessary . . . and every order of either branch involving expenditure of money, shall be presented to the mayor." If he approves, he is to signify his approval by signing; and if not, he is to return it with his objections to the branch in which it originated. It may then be passed, notwithstanding his objections, by a two thirds vote taken by yeas and nays. If it is so passed, it is to be in force. If the mayor fails to return it within ten days after it is presented to him, it is to be in force.

Under these sections, an order of the city council cannot take effect until after the mayor has approved it, or returned it with objections, or has allowed ten days to pass without such action after it has been presented to him. Until then it is uncertain whether it will ever be in force. If he approves, it takes effect from the time of his approval; if he returns it with his objections, and it is subsequently passed by a two thirds vote of the city council, it takes effect from the time of such subsequent passage. If he allows ten days to pass without action after receiving it, the expiration of this time gives the order full validity. If he returns it with objections and it is not subsequently approved by a two thirds vote of the city council, it never takes effect.

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This is in accordance with the plain meaning of the language of the statute, and with numerous decisions of other courts upon similar questions. *Gardner* v. *The Collector*, 6 Wall. 499, 504. *Louisville* v. *Savings Bank*, 104 U. S. 469, 478. *In re Welman*, 20 Vt. 653, 656. *Tarlton* v. *Peggs*, 18 Ind. 24. *People* v. *Clark*, 1 Cal. 406. *State* v. *Mounts*, 36 W. Va. 179, 185, 186.

The term of two years did not begin to run until the order was approved by the mayor.

Appeal dismissed.

HIRAM E. CAMPBELL *vs.* JUSTICES OF THE SUPERIOR COURT.

Suffolk. January 18, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Contempt. Equity Jurisdiction.

A plaintiff in a suit in equity, who is in contempt for failing to obey an injunction granted on a cross bill in the same suit, cannot go on with his case against the defendant as a matter of right, and this court will not grant a writ of mandamus directing the justices of the Superior Court to proceed with the hearing of his suit in that court.

Whether in a suit in equity the court properly can order a party, who is in contempt for failing to obey an injunction in the suit, to pay a sum of money to the adverse party in compensation for the damages caused by his violation of the injunction, *quære*.

PETITION, filed May 9, and amended June 8, 1904, for a writ of mandamus addressed to the justices of the Superior Court, commanding them to proceed with the hearing of a suit in equity pending in that court brought by the petitioner against the Carpenter-Morton Company and others.

The case came on to be heard before *Barker*, J. upon the amended petition and answer, and was reserved by him for determination by the full court, such decree to be entered as justice might require.

By the petition and answer, it appeared, that the suit in equity brought by the petitioner was to restrain the defendants from using certain secret formulas, alleged to belong to the plaintiff, used in the manufacture and sale of varnish stains, and for an

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accounting; that the defendant Carpenter-Morton Company filed a cross bill on which it obtained a decree, declaring that Campbell had conveyed to the Carpenter-Morton Company the absolute right to manufacture, use and sell an article known as "Campbell varnish stain" and enjoining the petitioner from manufacturing or selling that article; that thereafter the petitioner continued to manufacture and sell the article and was adjudged to be in contempt of court, and that, after a finding that the petitioner was sane and morally responsible, a further decree was made adjudging the petitioner to be in contempt and ordering him to pay to the Carpenter-Morton Company the sum of $1,000 and costs within ten days; and that the petitioner failed to make the payment thus ordered.

W. B. Grant & E. O. Achorn, for the petitioner.

G. W. Anderson, for the respondents.

KNOWLTON, C. J. This is a petition for a writ of mandamus to compel the justices of the Superior Court to proceed with the hearing of a suit in equity, upon exceptions to a master's report, and thereafter upon the merits. We treat the reservation as a report of the questions of law which arise upon the record and the agreement of the parties, under the R. L. c. 156, § 7. We do not think that the slight change in this section from the language of the Pub. Sts. c. 150, § 8, was intended to change the meaning of the provision, and it has always been held that a justice of the Supreme Judicial Court, sitting at the trial of an action at law, might report questions of law to the full court, without deciding them.

The petitioner, who is the plaintiff in that suit, is in contempt of the court for a violation of an injunction. The principal question is whether a plaintiff who is in contempt has an absolute right to proceed in the trial, such that it is the legal duty of the court, upon his request, to permit him to go on.

The authorities agree upon the familiar doctrine that a party in contempt is not in a position to ask the court for any favor or indulgence. 1 Dan. Ch. Pl. & Pr. (5th Am. ed.) 504, 505 and notes. *Hovey* v. *Elliott*, 167 U. S. 409, and cases cited. *In re Wickham*, 35 Ch. D. 272. *Clark* v. *Dew*, 1 Russ. & M. 103. *Ricketts* v. *Mornington*, 7 Sim. 200. *Rogers* v. *Paterson*, 4 Paige, 450. In *Hovey* v. *Elliott*, *ubi supra*, many cases were reviewed,

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and it was held that when a defendant in equity has filed an answer and prepared a defence, the plaintiff cannot have his answer stricken from the files and the case go to judgment against him, because of his subsequent contempt. It was decided that such a proceeding, if enforced, would be a taking of property without due process of law. The case of *Walker* v. *Walker*, 82 N. Y. 260, which shows a different view, was criticised, and held to be without substantial support in the cases therein referred to. But the decision is not in conflict with the contention of the present respondents, that a plaintiff, while he is in contempt, cannot proceed to a trial upon the merits. The early English cases are conflicting on this point; but those that are relied upon by the petitioner, (see *Wilson* v. *Bates*, 3 Myl. & Cr. 197; *Cattell* v. *Simons*, 5 Beav. 396; *Chatterton* v. *Thomas*, 36 L. J. Ch. 592,) seem to be practically overruled by *In re Wickham*, 35 Ch. D. 272, which holds that a plaintiff, who disobeys an order for the payment of costs on a preliminary matter, will not be allowed to proceed with his case. The principle is analogous to that which precludes a plaintiff who is nonsuited in an action at law from prosecuting a second suit until he has paid the costs, R. L. c. 203, § 11, and it is inconsistent with the petitioner's contention that a plaintiff who has failed to do that which properly is required of him in the case may insist upon a trial as a matter of right.

If a plaintiff prays for a decree against his adversary we are of opinion that the principles stated in the cases first cited should be applied to a request to proceed with the case to a final judgment, as well as to requests for preliminary favors. It is plain that misconduct of a plaintiff that is treated as a contempt often may be of such a kind as would make it impossible to go on with the case without great injustice to the defendant. Suppose, for illustration, that a plaintiff disobeys an order to produce books and papers which the defendant is entitled to have in evidence, or refuses to answer interrogatories, or questions put to him as a witness on the stand. It would be absurd to say that, while in contempt for disobedience of an order of this kind, a plaintiff would have a right to have the trial proceed.

The statement of the law in *Brinkley* v. *Brinkley*, 47 N. Y. 40, 49, is, that "a party in contempt . . . will not be permitted to ask for the favor of the court, nor to take any aggressive pro-

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ceedings against his adversary." The following cases also tend to support this proposition, with greater or less force: *Rogers* v. *Paterson*, 4 Paige, 450. *Hazard* v. *Durant*, 11 R. I. 195. *Walker* v. *Walker*, 82 N. Y. 260. *Pickett* v. *Ferguson*, 45 Ark. 177, 191. *Allen* v. *Georgia*, 166 U. S. 138. *Robinson* v. *Owen*, 46 N. H. 38. In *Gordon* v. *Gordon*, 141 Ill. 160, 163, the court said: "Where a complainant is in contempt there may be cogent reasons for holding that his proceedings shall be stayed so long as he remains in contempt, under the well known maxim that 'he who seeks equity must do equity.'" In the opinion in *Atchison, Topeka & Santa Fe Railway* v. *Jennison*, 60 Mich. 232, are found these words: "A complainant in a court of equity can always be compelled by that court to perform any conditions . . . which the court has a right to exact, by refusing to allow him to proceed in his cause until he does what he ought to do." In *People* v. *Horton*, 46 Ill. App. 434, the court held that a defendant was not precluded from his right to defend by being in contempt, and added: "Had the suit been at his instance, and in such suit he, acting as one asking for relief, had been in contempt, a different question would have been presented." We are of opinion that a plaintiff, who is in contempt of court, cannot go on with his case against the defendant as a matter of right. In many cases it would be plainly wrong to permit him to do so. It is conceivable that in others his objectionable conduct may be of such a kind, and the circumstances of the case may be such, that the court, in the exercise of its discretion, properly may permit him to go on. In a case like the present the court ought not to issue a writ of mandamus to compel the Superior Court to proceed with the trial.

It is contended that the last decree, ordering the plaintiff to pay the sum of $1,000 to the defendants, was erroneous. This part of the decree was intended to give the defendants compensation for their damages, caused by the plaintiff's violation of the injunction. It has been said that, in the absence of statutory authority, the court cannot assess a party's damages for a breach of an injunction, in a proceeding of this kind, and order them paid by the party in contempt. *Swift* v. *State*, 63 Ind. 81. *Morris* v. *Whitehead*, 65 N. C. 637. *In re Pierce*, 44 Wis. 411. *State* v. *Lonsdale*, 48 Wis. 348. *Eads* v. *Brazelton*, 22 Ark. 499.

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On the other hand, similar orders have been made without the authority of a statute. *Wells* v. *Oregon Railway & Navigation Co.* 19 Fed. Rep. 20. *In re North Bloomfield Gravel Mining Co.* 27 Fed. Rep. 795. *United States* v. *Atchison, Topeka & Santa Fe Railway*, 16 Fed. Rep. 853. In New York and Wisconsin, and probably in some other States, there are statutes in regard to this subject.

We do not find it necessary to determine whether this part of the order is regular; for, if it is not, there is a valid adjudication that the plaintiff is in contempt. The decree referred to is in such a form that the first part of it is complete in itself, as an adjudication that the plaintiff is in contempt, and is separable from the last part, ordering the payment of damages.

We have considered the case on the merits, without passing on the question whether the petitioner has exhausted his rights in other forms of proceeding, so as to be entitled to make an application for this extraordinary remedy.

Petition dismissed.

RICHARD HOLMES & others *vs.* JOHN E. HUMPHREYS.

Suffolk. January 19, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Mechanic's Lien. Practice, Civil, Parties.

On a petition to enforce a mechanic's lien, where the original respondent as the owner of the real estate has filed a bond with sureties to dissolve the lien, and later has died intestate, and, the time for presenting claims against his estate having passed, his administrator has filed a final account by which it has appeared that there were no assets and has died, the proceeding being in the nature of a proceeding *in rem* and the liability on the bond representing the *res*, if the petitioner cannot procure the appointment of an administrator *de bonis non* of the estate of the original respondent, the principal on the bond, he may proceed against the sureties alone, the administrator, although a proper party, not being a necessary party to the proceeding.

KNOWLTON, C. J. This case was considered at length when it was formerly before us, as appears by the report in 181 Mass. 181. There now remains for decision a question which then was

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left undetermined, because it was not before us, namely, whether the petitioners can proceed without an administrator of John E. Humphreys' estate as a party respondent. It seems to be impossible for them to procure the appointment of an administrator, and if they cannot go on with the present parties their suit will be unavailing. See *Hubbard, petitioner*, 185 Mass. 22.

It before was held that an administrator was a proper party respondent, as the representative of the original debtor, both on his liability for the debt and as the principal upon the bond, given as security, which stands instead of the real estate. But whether the case can go on to a valid judgment without such a party, if all other interests are before the court, is a question which has not been considered.

Previously to the enactment of the St. 1871, c. 78, a debtor, who was not the owner of the property, was not required by the statute to be served with notice of the proceedings. Under Gen. Sts. c. 150, § 14, the owner of the building or structure was to be served with an attested copy of the petition and order of the court thereon, and notice of the filing of the petition was to be given to the debtor and to all other creditors having liens of the same kind upon the estate, by serving them with a copy of a separate order. This provision appears also in Pub. Sts. c. 191, § 16. By the St. 1888, c. 344, § 2, which appears without material change in R. L. c. 197, § 12, this provision was amended, so that a precept is issued, directing the officer to summon the owner of the estate, and to notify the debtor and all creditors having like liens upon the property. Under R. L. c. 197, § 22, if the debtor dies after the filing of the petition, "it may be prosecuted against his executor, administrator, heirs or assigns as if the estate or interest had been mortgaged to secure the debt." Under these statutes there is no doubt that an administrator of a deceased debtor is a proper party to the proceedings. As was said by Chief Justice Shaw in *Howard* v. *Robinson*, 5 Cush. 119, 121, "The course directed by statute is conformable, in part, to proceedings *in rem*, and partly to those *in personam;* but the object being to charge the estate with a lien, an incumbrance wholly independent of the personal remedies which a contracting party may have, the course of proceeding must be considered as most nearly resembling a proceeding *in*

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rem." Perhaps for this reason the statute makes a distinction in regard to the process to be issued, between the owner and the debtor, when they are different persons. The one is to be summoned, and the other, like creditors having a collateral interest, is to be notified. As the judgment is *in rem*, and not *in personam*, we have no doubt that, where jurisdiction cannot be obtained of the debtor, he is not a necessary party, and the proceedings can go on without him, as they could not if the suit were *in personam*. We are therefore of opinion that, where the debtor who was the owner has ceased to have an interest in the estate, and has deceased, and his estate has been settled, and the time for presenting claims has passed, and there were no assets for his heirs, his administrator is not a necessary party, even though he is a proper party, to proceedings to enforce a mechanic's lien.

If the owner, on selling the estate, has given a bond with sureties, as he did in the present case, his administrator, after his decease, is a proper party because of the liability on the bond which is the *res* representing the estate that has been sold. But if the owner's estate has been settled and the administrator has deceased, and if the other conditions are as supposed in the last part of the last paragraph, and the sureties on the bond have been notified and have appeared, we are of opinion that the case may be prosecuted to judgment without the appointment of an administrator *de bonis non*. The importance of notice to the administrator or the sureties is not because there may be a judgment against them in the suit, but because they are under a liability which gives them a direct interest in the judgment, such that they ought, in the absence of any other representative of the property, to have an opportunity of being heard. In this case the sureties have this opportunity, and the estate of Humphreys has no actual interest that can be represented by an administrator. See *Jennings* v. *Hinkle*, 81 Ill. 183.

Case to stand for hearing before an auditor.

G. P. Wardner, for the petitioners.

T. Hunt, for the sureties on the bond.

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ATTORNEY GENERAL *vs.* PREFERRED MERCANTILE COMPANY OF BOSTON.

Suffolk. January 19, 20, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Quo Warranto. Practice, Civil. Lottery. Obligations redeemable in Numerical Order. Constitutional Law. Information.

The answer of a corporation to an information by the attorney general in the nature of a *quo warranto*, requiring it to show by what authority it is conducting the business in which it is engaged, is not necessarily to be taken as true.

Under R. L. c. 156, § 7, a single justice of this court can report to the full court the questions of law which arise upon the record before him without deciding the questions.

The issuing by a corporation of obligations with an element of chance in their redemption, arising from uncertainty as to the number of persons holding similar obligations who will allow them to lapse and uncertainty as to the number of persons who will take new obligations and make payments thereon, is not punishable as a lottery under R. L. c. 214, § 7.

Obligations issued by a corporation, on which payments of one dollar each are to be made every week under penalty of forfeiture upon default for five successive weeks, which are redeemable each week in the order of their issue whenever an amount of money sufficient for that purpose is on hand received from ten cents set aside from every dollar paid on new obligations issued, are redeemable "in numerical order," even though numbered differently, and in an "arbitrary order of precedence without reference to the amount previously paid thereon by the holder," and their issuing is a violation of R. L. c. 73, §§ 7, 8.

R. L. c. 73, §§ 7, 8, imposing certain penalties for issuing obligations to be redeemed in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder, is constitutional as a reasonable exercise of the police power.

An information by the attorney general in the nature of a *quo warranto* is a proper proceeding to enforce the forfeiture of the charter of a domestic corporation under R. L. c. 73, § 8, by reason of its issuing obligations to be redeemed in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder, in violation of § 7 of the same chapter.

KNOWLTON, C. J. This is an information in the nature of a *quo warranto*, brought against the defendant corporation, to require it to show by what authority it is conducting the business in which it is engaged. It is a proceeding at law, and not in equity; but the defendant's answer is not necessarily to be taken as true, like the answer of a judicial tribunal to a petition for

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a writ of certiorari. See *Haven* v. *County Commissioners*, 155 Mass. 467. The reservation is informal, but we treat it as made under the R. L. c. 156, § 7, to report to this court the questions of law which arise upon the record. Such a report may be made by a justice of this court, without deciding the questions. See Pub. Sts. c. 150, § 8; *Campbell* v. *Justices of the Superior Court*, *ante*, 509. No question of pleading is raised, and the material facts of the case are not in dispute.

The defendant was organized under the St. 1903, c. 437, for the purpose of "conducting the business of dealing in diamonds, buying, leasing and selling the same," etc. The allegation on which the informant relies is that the defendant "has grossly abused and misused its corporate authority, franchises, and privileges, and has assumed franchises and privileges not granted to it, by issuing, selling, and redeeming, as its sole business, a certain form of obligation called 'diamond lease,'" a copy of which is annexed. Another allegation, made in reference to the St. 1904, c. 427, is waived by the attorney general.

The business of the defendant is the issuing of obligations called leases, to persons who apply for them, the contract in each case being that the applicant shall pay $1 on delivery of the lease, and $1 per week thereafter, until the sum of $110 is paid in all, by which the lease becomes fully paid; that if there is a default in his payments, he shall forfeit twenty-five cents per week for each week that he is in default, and if he continues in default for five consecutive weeks, the lease shall be void and he shall forfeit all the sums paid, which will be retained by the corporation as liquidated damages. Of each dollar paid the corporation is to use seventy cents, together with the moneys received from lapses, fines and transfer fees, for the purchase and delivery of the diamonds called for by the leases, ten cents for a contingent fund, which is to be used in redeeming weekly the oldest unredeemed leases in their order whenever the amount on hand is sufficient for that purpose, and twenty cents, together with the difference between the wholesale price and the retail price of the diamonds, to defray the expenses of managing the business. The corporation agrees to call in and redeem as many of the oldest outstanding, unredeemed leases as the funds will permit, each week, by the delivery of a commercial, white, clear

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and flawless diamond, of the proper weight and value for the week in which the redemption occurs. A lease calling for a payment of $110 in all by the holder, entitles him to receive a diamond two carats in weight, worth $200. It appears, also, that the company has represented to its customers that it will furnish purchasers for the diamonds to which lessees are entitled, who will pay $160 for each one of the value of $200, and that, whenever requested, it has either taken them or procured others to take them at that price.

There is no source from which to obtain money to supply diamonds, or the money to be paid instead of them, to leaseholders, except the payments of the leaseholders themselves. The company promises to every leaseholder a diamond worth $200, or cash to the amount of $160, for a payment of $110. But these diamonds and moneys can only be delivered to the leaseholders when the funds appropriated to that purpose enable it to be done. Twenty per cent of the receipts from regular payments are taken at once by the corporation for conducting the business. The amount received from forfeitures on lapsed contracts goes to meet obligations, and it is manifest that, without a large number of lapses or of takers of new obligations or both, the business would quickly come to an end, leaving the late comers with no returns for their payments. Although a few may make gains, the certainty of great loss to the deluded investors as a class is obvious at a glance. A scheme more injurious and misleading, in its effect upon that part of the public who are easily entrapped by a plausible offer to give much for little, hardly can be conceived. But the question now before us is whether the business is forbidden by law.

It is contended by the attorney general that the corporation is conducting a lottery, and that its managers are punishable criminally under the R. L. c. 214, § 7. To come within this section, the money or property must be disposed of "with intent to make the disposal thereof dependent upon or connected with chance by lot, dice, numbers, game, hazard or other gambling device." The element of chance, entering into the payments in this case, arises from the uncertainty as to the number of persons who will allow their contracts to lapse, and as to the number who will take new contracts from the company

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and make payments to it after the issuing of the contract in question.

There are cases which give some support to the contention that this kind of uncertainty is chance, which will make the business a lottery within the meaning of this statute. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 515, is a case of this kind. The master to whom that case was referred held a scheme like the one now before us to be a lottery, and the opinion of the court confirmed his view. Only a part of the justices seem to have sat at the argument. One of these dissented, and those who concurred in the decision concurred only in the result. The statute in question was one in regard to a wrongful use of the mails, and the postmaster general, in making the order in question, "acted upon the theory that the complainant was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretences, etc., and not in conducting a lottery." We infer that some of the concurring justices took the view of the postmaster general. The case of *United States* v. *McDonald*, 59 Fed. Rep. 563, which was affirmed by the Circuit Court of Appeals in 63 Fed. Rep. 426, was put by the Appellate Court upon a narrower ground than that stated by the judge before whom the case was tried. In that case there was a use of multiple numbers, which introduced a specific element of chance, such as is common in lotteries. In *McLaughlin* v. *National Mutual Bond & Investment Co.* 64 Fed. Rep. 908, *United States* v. *Fulkerson*, 74 Fed. Rep. 619, and *State* v. *Interstate Savings Investment Co.* 64 Ohio St. 283, the chance relied on as constituting the scheme a lottery was found in an uncertainty as to the order in which obligations were redeemable, which does not exist in the present case. It has been held repeatedly that such a chance as the uncertainty in regard to the number of contracts that will be allowed to lapse, or the number of new contract takers who will come into a scheme of this kind, is not a chance which makes the scheme a lottery. *Equitable Loan & Security Co.* v. *Waring*, 117 Ga. 599. *Union Investment Association* v. *Lutz*, 50 Ill. App. 176. See *United States* v. *Rosenblum*, 121 Fed. Rep. 180; *People* v. *Fallon*, 152 N. Y. 112; *Horner* v. *United States*, 147 U. S. 449, 458. We are of opinion that the business conducted by the

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defendant does not constitute a lottery, within the meaning of R. L. c. 214, § 7.

The attorney general relies upon R. L. c. 73, §§ 7, 8, and cites *Attorney General* v. *Pitcher*, 183 Mass. 513. We are of opinion that the defendant's business is conducted in violation of this statute. The corporation issues obligations "which are by the terms thereof to be redeemed in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder thereof." The order in which the applications are made, which is the order in which they are redeemable, may well be called a numerical order, even though they are numbered differently. They are to be redeemed in an arbitrary order of precedence, for the word "arbitrary," as here used, means nothing more inflexible than a numerical order, or the order in which the applications were made. The case last cited is almost identical with the present case in its relation to this statute. The purpose of the act is to prevent the issuing or negotiation of obligations which are redeemable in an established order, such that the result will be uncertain, involving a kind of chance in reference to the amount paid out or invested to preserve the holder's rights, and in reference to the relative returns which will be received. Leases may be taken at one time in so great numbers, and payments of instalments be made so rapidly, that some of the earlier leases will be redeemed long before they are fully paid. At another time there may be a lack of funds, with a long interval between the redemption of the contracts upon two successive applications, or the earlier one may be redeemed and the later one never redeemed. It is evident that sometimes redemption would come to those who had paid but little, and at other times it would come only long after full payment. We think that this arbitrary order of precedence, taken in connection with the uncertainty as to the time when the redemption will occur, if it occurs at all, is an order and a redemption without reference to the amount previously paid by the holder, within the meaning of this statute.

The defendant contends that the statute is unconstitutional. We do not deem it necessary to discuss this question at length. The act was passed in the exercise of the police power, to prevent methods and processes which are exceedingly detrimental

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to the people, and which are fraudulent in substance and effect, through the representations which are an almost necessary part of the business, some of which appear in the printed exhibits before us. See *Commonwealth* v. *Huntley*, 156 Mass. 236; *Plumley* v. *Massachusetts*, 155 U. S. 461.

By § 8 of this chapter, a violation of the provisions of the preceding section, by a domestic corporation, operates as a forfeiture of its charter. It is not denied that this is a proper kind of proceeding to enforce the forfeiture of the franchise of a corporation. *Attorney General* v. *Salem*, 103 Mass. 138, 139. *Campbell* v. *Talbot*, 132 Mass. 174, 177. *Attorney General* v. *Sullivan*, 163 Mass. 446.

Judgment of ouster.

B. B. Jones & J. S. Allen, Jr., for the defendant.

F. H. Nash, Assistant Attorney General, for the plaintiff.

BERTHA F. RICHARDS *vs.* NELLIE M. APPLEY.

Middlesex. January 20, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Practice, Civil, Exceptions.

Where no ruling has been asked for, and a finding has been made by a judge sitting without a jury, it is too late to except to the finding on the ground that it is not warranted by the evidence.

If a finding by a single justice of this court sitting without a jury expressly includes a ruling of law, first made when the decision is filed some time after the end of the trial, R. L. c. 178, § 106 requires a party who desires a revision of the ruling to reduce his exception to writing and file it with the clerk within twenty days after notice of the decision has been received, unless further time is allowed by the court, but this does not give the excepting party twenty days within which to allege his exception. On the contrary he must allege it promptly within a reasonable time after receiving notice of the ruling, and not to allege it until filing his bill of exceptions twenty days after the decision is unreasonable and in such a case the exception must be disallowed by the single justice as alleged too late.

CONTRACT on a promissory note for $1,600, payable on December 12, 1902, with interest at the rate of five per cent

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per annum. Writ in the Supreme Judicial Court dated July 20, 1903.

The case was tried before *Hammond*, J., without a jury, on April 26, 1904. On May 5, 1904, the justice filed his findings and a "memorandum of basis of finding." He found for the plaintiff, and assessed damages in the sum of $1,750.55. On May 7, 1904, the defendant filed a motion for a new trial. On May 25, 1904, the defendant filed a bill of exceptions. On June 7, 1904, at a hearing to settle the bill of exceptions, the defendant waived her motion for a new trial. The exceptions alleged had not been taken at the trial. The plaintiff objected to the allowance of the bill of exceptions on the ground that no exceptions had been taken. The justice at the foot of the bill of exceptions signed the following statement: "Exceptions allowed so far as I have the right to allow them."

J. J. Higgins, for the defendant.

S. K. Hamilton, (*A. L. Richards* with him,) for the plaintiff.

KNOWLTON, C. J. It appears in the record that the plaintiff objected to the allowing of this bill of exceptions on the ground that no exception was taken. The certificate of the justice is, "Exceptions allowed so far as I have the right to allow them." This presents the question whether an exception was taken in such a form as to entitle the defendant to an allowance of it.

The only question of law which the defendant seeks to present is whether the evidence warranted the finding of the presiding justice. There was no request for a ruling on this subject, nor any exception alleged or taken previously to the filing of the bill, twenty days after the filing of the findings and memorandum of opinion by the justice, and at least nineteen days after the defendant received notice of these findings.

The case is covered by the decision in *Keohane, petitioner*, 179 Mass. 69, in which, as in this case, the trial was before a judge without a jury, and the defendant, after a decision, sought to raise questions of law involved in the findings. In the opinion the court says: "The judge therefore ruled by implication that the evidence warranted a finding of substantial damages. It may be urged that the correctness of this implied ruling is open. But, in our opinion, if a party wishes to save a question of law

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upon the evidence, he must do so before the trial is over, and cannot raise it for the first time by what may be an afterthought, although it was not so in this case. If a judge should leave a case to a jury upon a wrong ruling, it would be too late to except after a verdict had been returned. The rule is the same when the finding is by the judge. If there has been no preliminary understanding or arrangement for saving a party's rights, it is too late to except to a finding as unwarranted by the evidence after it has been made."

There is another reason why this exception should not be considered. If a finding expressly includes a ruling of law first made when the decision is filed a considerable time after the end of the trial, the statute requires that an exception shall be alleged if the party desires a revision of the ruling. R. L. c. 173, § 106. This section also requires that it shall be reduced to writing and filed with the clerk within twenty days after the verdict is rendered, or if the case is tried without a jury, within twenty days after the notice of the decision is received. This notice must be given by the clerk. R. L. c. 165, § 19. This statute has always been interpreted as meaning that, to save an exception, it must be alleged promptly. Rule 48 of the Superior Court is as follows: "No exception shall be allowed by the presiding justice, unless the same be alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given. And all exceptions to any charge to the jury shall, unless previously saved, be alleged before the jury are sent out. When further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following. All requests for instructions shall be made in writing before the closing arguments unless special leave is given to present further requests later." That court has had a similar rule for many years. In *Joannes* v. *Underwood*, 6 Allen, 241, Chief Justice Bigelow said, "This rule is a wise and salutary one, which the court was fully authorized to pass." See also *Lee* v. *Gibbs*, 10 Allen, 248; *Spooner* v. *Handley*, 151 Mass. 313, 317. The provision of the statute, allowing twenty days for reducing the exceptions to writing and filing them, has no reference to the time of alleging them. See *Lee* v. *Gibbs*, *ubi supra*.

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In the present case the trial was in the Supreme Judicial Court, which has no rule on this subject, although it has always interpreted the statute in practice as the Superior Court interprets it by its rule. It may be said that the rule of the Superior Court should not be applied literally to a case where the ruling is made in writing by filing a decision in the absence of the parties, a considerable time after the end of a trial. Granting this, the statute should be interpreted as requiring that exceptions be alleged promptly, within a reasonable time after the notice of the ruling. The rule of the Superior Court allows twenty-four hours for alleging exceptions where additional instructions are given to the jury in the absence of the parties, which is a reasonable time. A failure to allege them at all, until the filing of the bill twenty days after the decision, is not alleging them promptly, within a reasonable time, as required by the statute.

On both grounds the bill of exceptions must be dismissed. We come to this conclusion without reluctance, as a perusal of the evidence shows that the decision was well warranted.

Exceptions dismissed.

FREDERICK G. MAY & another *vs.* FRANK BREWSTER, trustee, & others, administrators with the will annexed.

Suffolk. January 24, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Executor and Administrator, Powers. *Devise and Legacy*, Construction.

Where a will plainly shows an intention of the testator that his real estate should be sold and the proceeds distributed in the settlement of his estate, the executor has power to sell real estate without an express statement to that effect.

Where a will plainly shows an intention of the testator that his real estate should be sold and the proceeds distributed in the settlement of his estate, giving the executor by necessary implication the power to sell real estate, the power is attached to the office and not to the person and passes to an administrator with the will annexed.

A will in the handwriting of the testator drawn without the aid of counsel contained the following provisions: "I direct my executors to proceed with moderation and patience but with due diligence to the winding up of my estate, largely consist-

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ing of real estate which is in my opinion of considerable value but more or less encumbered. My immediate assets of any considerable amount are my life policy in $2,500, originally but now swollen by the regular addition of the company's dividends. . . . Both of these above named policies are with the New England Mutual Life Ins Co of Boston. Then after the payment of debts and the legacies above named I direct the division of the net proceeds into parts, one for each of my children as follows," naming the testator's four daughters and one son, and providing that the daughters' shares should be held for their benefit by a trustee named. No executor was named in the will, and administrators with the will annexed were appointed. *Held*, that the will disposed of the proceeds of the testator's real estate as well as of his personal property, and that the legal title to the real estate vested in the five children of the testator, subject to a power coupled with a trust in the administrators with the will annexed, to sell the property to pay debts and legacies, and then to pay the net proceeds four fifths to the trustee for the testator's four daughters and one fifth to the testator's son.

PETITION, filed March 14, 1904, for the registration of the title to a tract of land on the corner of State Street and Broad Street in Boston.

In the Land Court the case was heard by *Davis*, J., who found title in the petitioners proper for registration, but, before a decree in accordance with such finding could issue, one of the petitioners, Frederick W. G. May, died at Boston, testate, seised of an undivided one fifth interest in the real estate in question.

Thereafter, the heirs at law of Frederick W. G. May, as petitioners for substitution, filed a suggestion of the death of Frederick W. G. May, together with a copy of his will and the probate proceedings thereon, and moved that they be substituted for him as parties in the petition to prosecute the same. On inspection of the probate records notice of the motion for substitution was ordered upon the trustee under the will and the administrators with the will annexed, who appeared and answered.

At the hearing upon this motion the case was submitted on the record title and agreed facts. The judge found as follows:

Frederick W. G. May died at Boston on May 28, 1904, seised of an undivided one fifth part of the real estate in question, leaving a will, and as his only heirs at law the petitioners for substitution. The will was proved on June 30, 1904, and Eleanor G. May and Frank Brewster were duly appointed and qualified as administrators of the estate of Frederick, with the will an-

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nexed. On September 29, 1904, Mr. Brewster was appointed and qualified as trustee under the will.

Frederick W. G. May was eighty-three years of age at the date of his death, and his will, dated August 24, 1900, was in his own handwriting and was drawn by him without the aid of counsel. He died seised of sundry parcels of real estate. The estate for which registration of title was sought, of which he owned an undivided fifth part, was income producing and free from mortgage. The other parcels of land owned by him were not in a condition to produce income sufficient to meet the charges thereon, and some of them were subject to mortgages. The total value of the testator's real estate over and above mortgages, which in the aggregate amounted to $58,000, was not less than $75,000. He died possessed also of personal estate of not less than $75,000 in value, consisting of stocks, bonds, mortgages and other securities, including the two policies of life insurance referred to in his will. The personal estate was considerably more than sufficient to pay all legacies and known debts, including the mortgages on his real estate.

The petitioners for substitution requested the judge to rule, as matter of law, that the interest of Frederick W. G. May in the real estate, on his death, vested in them in fee simple.

The respondent Brewster, trustee, requested the judge to rule that on the death of Frederick W. G. May his interest in the real estate vested in Mr. Brewster as trustee for the daughters of the testator, and in Frederick G. May, son of the testator, as devisees under the will in fee, four fifths thereof in the trustee and one fifth in Frederick G. May.

The administrators requested the judge to rule that the interest of Frederick W. G. May vested at his death in the devisees under his will, one fifth in Frederick G. May and four fifths in the trustee, subject, however, to a power of sale in his administrators, for the conversion of his property into money.

The judge refused to make any of the rulings as requested, but ruled instead that the interest of Frederick W. G. May vested at his death in his heirs, the petitioners for substitution, subject, however, to a power of sale in the administrators for the purpose of conversion under the terms of the will, and to any statutory lien for the payment of debts or charges of the estate within

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the time allowed by law. He ordered a decree for registration of title in the original petitioners other than Frederick W. G. May, and in the present petitioners for substitution, as to his undivided interest, subject as to the latter to the power of sale and statutory lien.

To the refusals to rule and to the ruling given, all of the parties excepted, and, at the request of the parties, the judge reported the case for determination by this court. If the rulings and refusals to rule were right, a final decree was to issue as ordered; otherwise, such final decree was to be made as this court might direct.

The will of Frederick W. G. May was as follows:

"I, Frederick Warren Goddard May now of 69 Adams St., Dorchester, in Boston Mass being of sound discerning mind and memory do hereby make and publish this my last Will and Testament revoking all others

"1st I desire that after the payment of all my debts and funeral expenses there shall be paid to the Treasurers respectively of the New England Hospital for Women & Children and the Massachusetts School for the Feeble Minded former known as the Massachusetts School for Idiotic Youth of both of which Institutions I have had the honor to be sometime Treasr One hundred dollars each to found a fund in both institutions if such funds do not already exist the income of which in both cases shall be devoted to the pleasuring or extra comforts of the inmates of said Institutions for the time being

"And while fully aware of the trifling nature of these gifts they are made to show my constant interest in both Charities If such funds are already founded as in the case of the Feeble-minded School I strove to do these gifts are to be added to swell the same the purpose and intent of the gifts being to give to the inmates some little treat outside of what may strictly fall within the rules or customs of these Institutions, if only a few packets of sweetmeats, a treat of good fruit or some rides in public or other conveyances

"And 2 give to Dr Helen Morton, Mrs. Helen M. Brown of Cambridge and her daughter Miss Jeanie Parkman Brown One hundred dollars each as mementoes from me and I direct my executors to proceed with moderation and patience but with due

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diligence to the winding up of my estate, wch largely consisting of real estate which is in my opinion of considerable value but more or less encumbered

"My immediate assets of any considerable amount are my life policy in $2500, originally but now swollen by the regular addition of the Company's dividends until now when it is more than twice that sum and a Ten payment policy for 5000 to which also the dividends have been added until the sum of 7000 has been reached

"Both of these above named policies are with the New England Mutual Life Ins Co of Boston

"Then after the payment of debts and the legacies above named I direct the division of the net proceeds into parts, one for each of my children as follows

"Eleanor Goddard May my only child by my first wife Eleanor Swan Goddard and Mary Jackson May now Mary May Eliot Anna Greenough May now Anna May Peabody Sarah Russell May now Sarah Russell May Stowell to be paid over to Frank Brewster Trustee to be held in Trust for each of my said daughters to be safely and as far as possible profitably invested to be free of all claim or interference of any husband if such there be and from all anticipatory action and the fifth remaining fifth part to be paid over to my only son Frederick Goddard May

"In case of the death of my eldest daughter Eleanor G May ~~if~~ still unmarried before this instrument becomes effective by my death her portion to be equally divided between the surviving sisters and brother or their representatives per stirpes.

"I intend to leave a memorandum of small gifts of personal property and of small sums of money by which I ask my Executrix to be guided unless she see overwhelming reason to depart from it. And first and foremost I direct One hundred dollars to be paid to my personal servants if in my faithful employ at the time of my death, and now at this present writing Christina McUpsic Cook, — Jeanie (or Jane or Janie) Sutton, Housemaid, and Philip Reilly my personal attendant

"Signed and sealed and published as my last will and testament this twenty fourth day of August in the year Nineteen hundred Fred W G May (l s)"

"Signed in the presence of the Testator by S. T. Gifford Louis A. Karcher Herbert R. Starratt Witnesses."

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H. M. Spelman, for the petitioners.

F. Brewster, trustee, *pro se.*

C. S. Rackemann, for the administrators with the will annexed of the estate of Frederick W. G. May.

KNOWLTON, C. J. This is a report from one of the judges of the Land Court upon a petition for the registration of a title. The question arises upon a petition for substitution, suggesting the death of F. W. G. May, one of the original petitioners, and asking to be admitted as successors to his title. He left a will in his own handwriting, which was made by him without the aid of counsel. Our decision depends upon the meaning of this will.

The principal question, to which all others are subordinate, is whether he intended to have the will take effect upon his real estate, or only upon his personal property. He mentions no particular real estate, nor any particular personal property except his policies of life insurance, which he refers to as his only immediate assets of any considerable amount. He says, "I direct my executors to proceed with moderation and patience but with due diligence to the winding up of my estate, wch largely consisting of real estate which is in my opinion of considerable value but more or less encumbered." The term "winding up" implies a disposition of the estate which will turn it into money. He follows the direction with this provision: "Then after the payment of debts and the legacies above named I direct the division of the net proceeds into parts, one for each of my children as follows," etc. The term "net proceeds" refers to the money which will come from the sale of the property. The will nowhere refers to any distinction between real and personal property. The estate which is to be wound up, under the direction first quoted, is immediately referred to as "largely consisting of real estate." This is an express statement that the real estate is to be wound up, as well as the personal. Then the statement in regard to its value and the incumbrances upon it, and the suggestion that the executors shall proceed with moderation and patience, but with diligence, strongly imply that he was considering the real estate as a part of the property with which the executors were to deal.

If we look at the final disposition of the property, we are

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confirmed in this view. The net proceeds are to be divided equally among his children, and the shares of his four daughters are to be put in the hands of a trustee for investment, and to secure them from the interference of husbands, and "from all anticipatory action." If the will was held to include personal property alone, there would be little, if anything, left for division and for the operation of this trust, after the payment of debts and legacies.

There is a presumption against an intended intestacy, and it is not to be supposed that an old man owning real estate worth more than $130,000, and having personal estate amounting to only a little more than enough to pay his debts and legacies, would make a will which should have no reference to the real estate. Taking all the provisions of this instrument together, we have little doubt that the testator intended to have the real estate sold, and the proceeds divided in the settlement of his estate in the Probate Court.

Where such an intention is plainly discoverable in a will, it gives to the executors a power of sale, without an express statement to that effect. *Going* v. *Emery*, 16 Pick. 107. *Chandler* v. *Rider*, 102 Mass. 268. *Putnam* v. *Story*, 132 Mass. 205, 212. This is a power coupled with a trust, and not a mere naked power. *Chandler* v. *Rider*, 102 Mass. 268, 271.

In the present case the direction already referred to is to executors, and in another part of the will there is a reference to the executrix. But no executor was appointed, and the estate is being settled by administrators with the will annexed. A power of this kind, given to executors, is attached to the office and not to the persons. It therefore goes to administrators with the will annexed. *Chandler* v. *Rider*, *ubi supra*. *Black* v. *Dexter*, 12 Cush. 559, 568, 569, 571. *Putnam* v. *Story*, 132 Mass. 205, 212. We hold, therefore, that the administrators in this case have a power under the will, coupled with a trust, to dispose of this real estate and turn it into money.

Under the decisions in *Hammond* v. *Putnam*, 110 Mass. 232, and *Perkins* v. *Coughlan*, 148 Mass. 30, it may be that, for some purposes, this real estate was constructively converted into personal property, as of the time of the death of the testator. In fact it remained in the form of real estate, and for the purposes of this case it must be dealt with as real estate.

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The trust in Mr. Brewster, to receive and hold for the four daughters the money paid over by the administrators with the will annexed, does not affect the legal title to the real estate before it is disposed of. His first duty as trustee is to take the money when it is ready to be paid over. We are of opinion that this title is in the five children of the testator, subject to a power in the administrators with the will annexed, coupled with a trust, to sell the property, pay debts and legacies, and then divide the net proceeds between the testator's son and the trustee for his four daughters.

Decree accordingly.

THEODORE H. TYNDALE, administrator, *vs.* EBEN C. STANWOOD & another.

Norfolk. January 25, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

Practice, Civil, Decree.

If an order made by a single justice of this court affirming a decree of the Probate Court is entered as a decree while exceptions to rulings of the single justice are pending, this in legal effect is not a decree but only an order for a decree, and if the rescript sent down by the full court contains an order "Decree affirmed", this refers to the decree of the Probate Court which is the only one in existence in the case, and to complete the record a decree must be made by a single justice of this court affirming the decree of the Probate Court, and remanding the case to the Probate Court for further proceedings.

PETITION for a final decree on a petition filed March 6, 1902, (incorrectly stated in 182 Mass. 534 to have been filed on November 3, 1902,) in the Probate Court for the county of Norfolk, by the administrator of the estate of Isabella S. Whicher for leave to sell real estate of the intestate under R. L. c. 146, § 1, in order to pay debts and charges of administration.

The petition for leave to sell real estate was before the court at a previous stage as reported in 182 Mass. 534, and again before the court on a writ of entry brought by the administrator as reported in 186 Mass. 59.

The present petition for a final decree came on to be heard

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before *Hammond*, J., who reserved the questions of law arising on the petition and answer and the facts as reported by him for determination by the full court.

The prayer of the petition was that in accordance with the rescript a final decree might be made and entered affirming the decree of the Probate Court, and remanding the case to the Probate Court for further proceedings.

R. M. Morse, (*W. H. Leonard* with him,) for the petitioner.

S. H. Tyng, (*J. P. Prince* with him,) for the respondents.

KNOWLTON, C. J. The question in this case grows out of the inadvertence of entering a final decree while exceptions were pending, which was considered at length in *Tyndale* v. *Stanwood*, 186 Mass. 59. The petition before us, which asks for the entry of a final decree in the court sitting for the county, has no other object than to correct and perfect the record in the Supreme Judicial Court, and thereby to correct the record in the Probate Court.

The final decree, inadvertently entered while exceptions were pending, took effect only as an order for a decree, which could not become operative until the exceptions were disposed of. *Tyndale* v. *Stanwood, ubi supra*. *Prescott* v. *Prescott*, 175 Mass. 64. *Green* v. *Crapo*, 181 Mass. 55. *Goff* v. *Britton*, 182 Mass. 293. The rescript which went from the full court, "Decree affirmed," must be held to have referred to the decree of the Probate Court, for no other decree was mentioned in the opinion, and the paper entitled "Decree" in the Supreme Judicial Court was in legal effect not a decree, but only an order for a decree. We have then a rescript which calls for a docket entry showing that the decree of the Probate Court is affirmed. Such a docket entry is not a decree. *Merrill* v. *Beckwith*, 168 Mass. 72. This entry was made, but no decree was afterwards drawn up or entered. It was, therefore, irregular to send to the Probate Court a copy of the order by the single justice, made while exceptions were pending; and the record of the Probate Court does not show correctly the proceedings in the Supreme Judicial Court. It is proper to complete the record in this particular by the entry of such a decree as the rescript calls for, and thereby to deprive the former error of its misleading effect.

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The principal argument against this is that a license should not be granted now, because more than five years have elapsed since the death of the grantor whose conveyance is sought to be set aside, and it is too late to maintain an action to try the title. R. L. c. 146, § 2. The difficulties thus suggested are great and obvious, and we do not intimate that the petitioners have shown a satisfactory way of escaping from them. We do not deem it necessary or proper to consider this subject in the present condition of the case. It is not as if we were now dealing with the rights of the parties on the merits under the original petition. That was done long ago, and the case was supposed to be ended. What we now are asked to do is formally to correct and perfect the record of what the court decided as a final disposition of the case when it was before us, more than two years ago.

We are of opinion that a final decree should be entered in the court sitting for the county, in accordance with the prayer of the petitioner.

So ordered.

JOSEPH H. TUTTLE, trustee, *vs.* FIRST NATIONAL BANK OF GREENFIELD & another.

FIRST NATIONAL BANK OF GREENFIELD *vs.* JOSEPH H. TUTTLE, trustee, & others.

Suffolk. January 25, 26, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

Trust, Powers of trustee. *Bills and Notes. Pledge. Bank. Equity Jurisdiction.*

A trustee with power to invest the trust property "according to his best judgment and discretion" and to pay the income to beneficiaries, with "full power to change any investment at his discretion," has no authority, unless it is expressly given by the terms of the trust, to pledge any part of the trust property to secure a promissory note signed by him as trustee, although the money lent upon the note goes into the trust fund and is expended for purposes for which the income of the trust lawfully could be expended.

If a trustee signs a promissory note as trustee without authority to do so the note is binding upon him personally.

A bank lending money on a note signed by a trustee as such and accepting as security a transfer of shares of stock belonging to the trust, if it has notice from

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the form of the stock certificate that the shares are held in trust, is put upon inquiry and takes the risk of the trustee having no authority to pledge the stock as collateral.

A bank which has lent money on the note of a trustee secured by a pledge of trust property after having notice of the trust, if it turns out that the instrument of trust gives the trustee no power to pledge the trust property, not only has no legal title to the property against the beneficiaries of the trust or a new trustee, but has no remedy in equity against the principal or income of the trust estate.

TWO BILLS IN EQUITY, filed respectively April 16, 1903, and February 19, 1904, the first bill by the trustee under the will of Horace S. Stebbins, late of Boston, praying that the defendant First National Bank of Greenfield be ordered to assign and deliver to him seven shares of the capital stock of the defendant Franklin County National Bank alleged to have been pledged without authority by George T. Clark, the plaintiff's predecessor as trustee, to a firm of brokers to secure the note of Clark, as trustee, to the brokers for $550, the note and shares of stock having been transferred by the brokers to the first named defendant, both the brokers and the first named defendant having had notice of the trust, and the second bill by the First National Bank of Greenfield, the first named defendant in the first suit, praying for a decree that the shares of stock might be sold and the proceeds applied to the payment of the note of Clark, trustee, held by the bank.

In the Superior Court the cases were heard together by *Hitchcock*, J. upon the pleadings and an agreed statement of facts. In the first case the judge made a decree that the plaintiff, Joseph H. Tuttle, trustee, be granted the relief prayed for, and in the second case that the bill of the bank be dismissed. The First National Bank of Greenfield, the first named defendant in the first case and plaintiff in the second case, appealed.

F. J. Lawler, for the First National Bank of Greenfield.

F. L. Hayes, for the trustee.

BRALEY, J. These two bills in equity grow out of the same transaction, and involve the right of a trustee without having authority under the terms of the trust, to pledge a part of the principal to secure the payment of a promissory note signed by him as trustee, the proceeds of which are used for the benefit of the estate, and whether the bank, as pledgee, which took with notice of the trust acquired a title that will enable it to retain and apply the collateral in payment of the debt.

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By the provisions of the will of Horace S. Stebbins, under which the maker of the note was trustee, he was directed and required to invest the property "according to his best judgment and discretion," and to pay over the income from time to time as it accrued to the beneficiaries, with "full power to change any investment at his discretion."

But this power did not clothe him with authority to pledge any part of the fund as security for the payment of a promissory note made by him as trustee although the money thus received went into the trust funds, and was expended for purposes for which the income lawfully could have been appropriated. *Hoyt* v. *Jaques*, 129 Mass. 286, 287.

Because of the absence of authority, and notwithstanding the recital in the body of the note, and form of its execution, the promise was his personal obligation enforceable against him alone while living, and after his death against his estate. St. 1898, c. 533, § 20, (R. L. c. 73, § 37.) *Fiske* v. *Eldridge*, 12 Gray, 474, 475. *Towne* v. *Rice*, 122 Mass. 67. *Plimpton* v. *Goodell*, 126 Mass. 119, 120.

At the time of the negotiation of the note the original payees, and subsequently the defendant bank, which held title under their indorsement, had notice by the form of the stock certificate and accompanying power of attorney, that the shares were held in trust. They were thus put upon inquiry, and must be held to have known what it was their duty to ascertain, that the trustee had no authority to pledge them as collateral security for an obligation that in law was his individual debt. *O'Herron* v. *Gray*, 168 Mass. 573, 576, and cases cited.

It is the further contention of the bank that even if it has no title to the stock which it can enforce against the present trustee, that because the money hired was used in part to pay taxes on the estate, and the remainder presumably in the form of income was paid to the beneficiaries, it should be permitted to maintain its bill to have the income of the trust already accrued, or as it accrues applied in payment of the note. But as we have said it had no contract which bound the estate, and for this reason it stands no better in equity than at law. Besides, as the bank must surrender the stock because it has no title, now to require the income to be appropriated to the payment of

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the note would be to say that while no part of the principal could be applied, the income might be taken, although the terms of the trust alike forbid the devolution of either for such a purpose.

Decree affirmed in each case.

EDGAR F. LEONARD *vs.* EDWARD F. DRAPER & others.

Norfolk. January 27, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LORING & BRALEY, JJ.

Bills and Notes. Street Railway. Corporation. Contract, Consideration.

Under R. L. c. 73, §§ 83, 84, the indorser of a promissory note warrants to all subsequent holders in due course the validity of the instrument and that all prior parties had capacity to act, and this was the rule before the passage of the negotiable instruments act.

In an action against indorsers of a promissory note who signed for the accommodation of the maker before the note was indorsed by the payee, the defences of invalidity and want of consideration are open under R. L. c. 73, § 81, in the same way that they would be in an action against the maker.

A street railway company may purchase shares of its own stock. The prohibition contained in R. L. c. 112, § 26, relates to the stock of other railway companies.

A corporation unless forbidden by statute to do so may purchase shares of its own stock.

The delivery of shares of stock in a corporation, supposed at the time to be of value but afterwards proving to be worthless, is a good consideration for a promissory note given in payment for the shares.

CONTRACT against the maker and indorsers of a promissory note for $1,675, dated September 14, 1900, and payable one month after date. Writ dated October 30, 1900.

The Superior Court gave judgment for the defendants on an agreed statement of facts; and the plaintiff appealed.

E. F. Leonard, pro se.

No counsel appeared for the defendants.

W. W. Crapo, C. W. Clifford & O. Prescott, Jr., by leave of court, filed a brief for a judgment creditor of one of the defendants.

KNOWLTON, C. J. This is an action upon a promissory note on which the defendants' names appear as indorsers. It is

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agreed that the note was duly signed and delivered and that due demand was made and notice given to charge the defendants as indorsers. These facts make a *prima facie* case against the defendants.

The defence relied upon is founded on a former note, which was paid in part by cash and in part by giving the note in suit. That note was executed in the name of a street railway corporation, by its treasurer, was payable to the order of O. M. Draper, who was the wife of the treasurer, and was indorsed by her and by the defendants, and they seem to have indorsed for the accommodation of the company. It is agreed that Draper, the treasurer, had no authority to sign the note for the corporation, and if the suit were against the corporation, this fact would be a good defence. But it is of no avail to these defendants. If we look to the form of the instrument alone, in which the name of the payee appears as the first indorser and the names of the defendants as subsequent indorsers, the R. L. c. 73, §§ 83, 84, apply, and the defendants warranted, among other things, the validity of the instrument, and that all prior parties had capacity to contract. This was the rule before the passage of the negotiable instruments act. *Kenworthy* v. *Sawyer*, 125 Mass. 28.

If the defendants signed before the payee indorsed the note, in regard to which the statement of agreed facts is silent, they are within § 81 of this chapter, under which they are liable to the first holder of the note after it takes effect, and to all subsequent parties. As the defendants signed for the accommodation of the maker, if they signed before the payee indorsed, defences as to legality or consideration are open under § 81, as they would be in a suit against the maker. *Dunscomb* v. *Bunker*, 2 Met. 8.

The only question as to legality which has been brought to our attention, arises from the fact that the note was given for capital stock of the corporation, which its officers thought it desirable to have the corporation buy. It is suggested that the purchase of shares of its capital stock by a street railway company is illegal, and that therefore a note given in payment for such stock is void. We have been referred to no authority in support of this proposition. Such a purchase was not a reduction of the capital stock within the meaning of R. L.

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c. 112, § 22, for the stock was kept in existence, ready to be sold and transferred to anotner party. The prohibition of ownership by a street railway company, contained in R. L. c. 112, § 26, relates to stock in another company, and not to the purchase of its own stock. The right of corporations to purchase their own stock, unless forbidden by statute, has been recognized. *Dupee* v. *Boston Water Power Co.* 114 Mass. 37, and cases cited. We discover no element of illegality in the note.

Nor do we see any reason to doubt that it was given for a valuable consideration. It was given for stock which was delivered in exchange for the note. The stock was property, and it was then supposed to be of value. The mere fact that subsequently it proved to be worthless does not affect the validity of the note. There was nothing in the former note that renders the note in suit incapable of enforcement.

Judgment for the plaintiff.

CHARLES W. GLIDDEN *vs.* MASSACHUSETTS HOSPITAL LIFE INSURANCE COMPANY.

Suffolk. January 27, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

Contract, Performance and breach. *Order. Condition.*

If an order for the payment of money is accepted as payable out of the first payment to which the maker of the order shall become entitled under a certain contract with the acceptor, and the first payment under that contract never is made because of a failure of the maker to perform the conditions precedent required before its payment, the fact that a payment is made by the acceptor of the order to the maker of the order under a new and independent contract does not waive the performance of the conditions under the first contract or make the acceptor in any way liable to the payee of the order.

CONTRACT upon an order for the payment of money accepted by the defendant upon the condition stated in the opinion. Writ in the Supreme Judicial Court dated December 19, 1902.

The case was tried before *Morton*, J., who directed the jury to return a verdict for the defendant on the ground that there was

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no evidence to show a performance of the condition of the acceptance of the order sued on, or of its waiver, sufficient to warrant the submission of the case to the jury. The plaintiff alleged exceptions.

S. L. Whipple & D. A. Ellis, for the plaintiff.

C. F. Choate, Jr., for the defendant.

KNOWLTON, C. J. This is an action of contract to recover the amount of an order accepted by the defendant. The order was dated Boston, July 23, 1901, signed by one Vinal and addressed to the defendant, requesting the payment to the plaintiff of the sum of $5,500 out of the first payment to which Vinal should become entitled on account of three mortgages given on that day to the defendant. It referred to the payment under the mortgages as $11,000, to be received when the first floor of the building to be erected on each lot should be in. On the same day the defendant accepted the order in these words: "Boston, July 23, 1901. The Massachusetts Hospital Life Insurance Company acknowledges the receipt of the foregoing order, and will make the payment to said Glidden therein called for, provided said Vinal becomes entitled to the first payment under said mortgages in accordance with the terms of his application therefor dated July 1, 1901. Massachusetts Hosp. Life Ins. Co. by Geo. A. Sawyer, Atty." At the end of the trial the justice ruled that there was no evidence of the performance of the condition of the acceptance of the order, or of its waiver, sufficient to warrant the submission of the case to the jury. The only question before us is whether this ruling was correct.

Vinal had applied to the defendant for a mortgage loan of $20,000 upon each of three lots of land, on each of which he was about to build a house. These were to be building loans, — that is, the defendant was to furnish the money in instalments from time to time, according to the progress of the work, as the buildings were erected. By the terms of the contract between the parties in the application, the stipulated payments were to be made by the defendant to Vinal upon each mortgage, at the times agreed, "provided the title and workmanship are satisfactory to the lender and no liens exist having priority to the mortgage of which George A. Sawyer's certificate shall be

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conclusive." The mortgages and accompanying notes were given by Vinal to the defendant, but the first payment by the defendant on account of the loans was to await the construction of the building to the first floor, and the performance of the other conditions as to title and liens, to the satisfaction of Mr. Sawyer, so that he might give his certificate. This condition was never performed. When the notes and mortgages were given by Vinal to the defendant, there were four prior mortgages outstanding on different parts of the property, together amounting to more than $24,000, and the taxes for the year 1901 were not paid.

On November 27, 1901, the defendant having been notified that the first floors of the houses were on and the walls up, Sawyer, representing the defendant, met Vinal, the plaintiff, and a representative of some of the mortgagees, at the registry of deeds, with four checks from the defendant for different sums, payable to his own order, which he intended to turn over to Vinal to be turned over at the same time for the discharge of incumbrances, if the conditions should seem to warrant it. At the registry he ran down Vinal's title in the usual way, from the time of his former examination, and examined the list of bankrupts which is posted there daily. He found that a petition in bankruptcy had been filed against Vinal two days before. He then told the others what he had discovered, and declined to proceed further that day. He thought that the filing of the petition affected the title to Vinal's property, on which these mortgages had been given previously without the advancement of any money upon them. He thought that no payment could safely be made to Vinal, or to the plaintiff as his creditor, and he was apprehensive that liens might be filed later for labor or materials.

By the terms of the contract, the decision of Sawyer on the question whether the title was satisfactory was made conclusive, and his adverse judgment, honestly entertained, was enough to leave the defendant free from obligation to make payments on account of the loan. *Gilson* v. *Cambridge Savings Bank*, 180 Mass. 444. Besides, his opinion was well founded in law. The rights of a trustee in bankruptcy relate back to the time of filing the petition by or against the bankrupt, and cover his property

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from that time. *Mueller* v. *Nugent*, 184 U. S. 1. *In re Krinsky*, 112 Fed. Rep. 972, 975. *In re Fraizer*, 117 Fed. Rep. 746. *In re Weinger*, 126 Fed. Rep. 875. *In re Mertens*, 131 Fed. Rep. 507, 516. *In re Goldberg*, 121 Fed. Rep. 578, 580. *In re Breslauer*, 121 Fed. Rep. 910. The prior mortgages were not discharged, nor was any attempt then made to discharge them. Sawyer, representing the defendant, waived nothing, the title was not satisfactory to him either as to the mortgages or liens, and neither Vinal nor the plaintiff was entitled to receive any payment from the defendant. *Gormley* v. *Kyle*, 137 Mass. 189.

The plaintiff contends further that the condition was performed or waived because the defendant and Vinal entered into a new agreement in regard to the construction of these houses, on June 13, 1902. On the same day, Vinal's trustee in bankruptcy made a deed of his interest in the property to Vinal, so that Vinal came in by a title which previously had been taken from him and had vested in the trustee by the proceedings in bankruptcy. Subsequently he transferred this title to one who held it for the defendant. Previously the defendant had taken up some of the prior mortgages, by paying the amount due, and was then holding them. The payment which was subsequently made to Vinal by the defendant, was under the new agreement, without which, presumably, nothing more would have been done by Vinal, and nothing would ever have become due to him. After receiving one payment under the new agreement, he abandoned the work and the defendant finished the houses.

The acceptance by the defendant gave the plaintiff no right, unless Vinal should become entitled to the first payment under the agreement then existing. There can be no recovery on the ground that Vinal became entitled to a payment under a new contract, made under changed conditions. We are of opinion that the ruling was correct.

Exceptions overruled.

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ELIZABETH F. DORR *vs.* HENRY J. SCHENCK.

Suffolk. January 27, 1905. — March 3, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

Practice, Civil, Exceptions. *Negligence,* Contributory.

The judge who presided at a trial properly may allow a defendant to amend his bill of exceptions although the time for filing exceptions has expired by adding to the statement that the judge refused to rule at the close of the plaintiff's evidence that the plaintiff could not recover a further statement that the judge again refused to make that ruling at the close of all the evidence, if it appears that this was what the defendant originally intended to state but that inadvertently he left the statement incomplete.

A person attempting to cross a city street containing parallel tracks of a street railway and a structure supporting an elevated railway above them, who waits to let a surface car go by on the nearer track and then to let another surface car go by on the farther track, the last car stopping on or near the crossing, and then passes together with other persons who are crossing the street behind this car to get upon the sidewalk beyond, and is struck by a rapidly moving horse and wagon, in an action against the driver of this team may be found to have been in the exercise of due care.

PETITION to prove exceptions, in an action of tort for personal injuries from being run down by the horse and wagon of the defendant while the plaintiff was crossing Washington Street in Boston after coming from Waltham Street, on August 6, 1901. Writ dated August 14, 1901.

At the trial in the Superior Court before *Hardy*, J. the jury returned a verdict for the plaintiff in the sum of $300 on March 3, 1904. On April 21, 1904, the period for filing exceptions having been extended to include that date, the defendant filed a bill of exceptions. On October 28, 1904, on application of the defendant the judge allowed him to amend his bill of exceptions by striking out the words "plaintiff's case" and inserting the words "all the evidence" in the manner described in the opinion. Whereupon the plaintiff filed this petition to prove the exceptions as they stood before the amendment, alleging that the amended bill of exceptions was not reduced to writing and filed within the period of time allowed by law.

A. G. Sleeper, for the defendant.

L. E. Guillow, for the plaintiff.

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KNOWLTON, C. J. We have now the unusual case of a prevailing party, against whom exceptions were taken, presenting a petition to prove the exceptions filed by his adversary. The petition is brought under R. L. c. 173, § 110, which applies not only to cases in which the judge disallows or fails to sign and return the exceptions, but also to cases in which he alters any statement therein. In this case the judge allowed the defendant, the excepting party, to alter the exceptions, against the plaintiff's objection, and the plaintiff treats this as an alteration of them by the judge, within the meaning of the statute. Assuming that she is correct in this, we must consider the nature of the alteration.

It is a familiar rule of law that amendments and alterations of exceptions, after they are filed, are presumably for the purpose of presenting the questions of law in the best form. As was said in *O'Connell, petitioner*, 174 Mass. 253, 256, "Absolute accuracy in all cases, in reducing exceptions to writing, is not to be expected. Accordingly, great liberality is shown in permitting amendments to bills of exceptions before they are allowed. When a party has in good faith attempted to comply with the statute in making his statement conformable to the truth, he should have ample opportunity before the judge to supply omissions and correct errors." But if he fails to file a bill of exceptions within the prescribed time, he loses his right to have them considered, and if he files a bill containing certain exceptions and omits altogether to include certain others that were duly taken, these cannot be added to a bill after the expiration of the time within which they might be filed. *Morse* v. *Woodworth*, 155 Mass. 233, 241. *O'Connell, petitioner, ubi supra*. *Hector* v. *Boston Electric Light Co.* 161 Mass. 558. This brings us to the facts of the present case.

At the close of the plaintiff's evidence, the defendant asked the judge to rule that there was no evidence that would warrant a verdict for the plaintiff. The judge refused, and the defendant took exception. The defendant then called witnesses, and at the close of the evidence made the same request, and on its refusal took exception. His bill of exceptions stated the request and exception in reference to the plaintiff's evidence, but failed to mention the subsequent request and exception. He was

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allowed by the judge, long after the expiration of twenty days, to amend his bill so as to state the exception as taken on the refusal of the request made at the close of all the evidence.

If we are to construe the bill strictly, as intended to include only what occurred at the end of the plaintiff's evidence, and consider the exception referring to all the evidence as a separate and independent subject, the amendment was allowed improperly, and the plaintiff was aggrieved by the order. If we construe it liberally, looking at the probable purpose of the defendant to state in full his exceptions upon the evidence, the amendment should be held proper, for the purpose of presenting that which was intended but inadvertently left incomplete. We think that the right of amendment should be treated liberally, in view of the purpose of a bill of exceptions, and the pressure of business under which such papers are often drawn. Perhaps we ought not to go so far as the statute goes in permitting amendments to pleadings in actions at law. R. L. c. 173, § 48. But it would be unjust to hold a party so strictly that, if he had an exception in mind in preparing his bill, he should be deprived of it on account of an imperfection in his mode of stating it. While the question in this case is not free from difficulty, we are of opinion that the defendant, in his original bill, undertook to state his exception as to the evidence, but accidentally omitted to state it in full. The petition to prove the exceptions as filed is denied, and the case will be considered on the bill as allowed.

This presents the single question, whether there was any evidence that the plaintiff was in the exercise of due care. We need not refer to the evidence in detail. As a general rule, it is a question of fact for a jury whether one who crosses a public street without watching for approaching teams is in the exercise of due care. *Murphy* v. *Armstrong Transfer Co.* 167 Mass. 199, and cases cited. This plaintiff was crossing Washington Street in Boston with others on the same cross walk. There were double surface tracks of an electric railway at that point, and above was the structure of the elevated railway near the side of the street. The plaintiff and others first waited for the passage of a surface car on the track immediately before her, towards her right, and then she waited for the passage of another car on the next track, towards her left. This car stopped just upon or

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beyond the cross walk on which she was going. She waited for it to go, and then as she passed behind it, near others who left the car to go to the side of the street, the rapidly moving horse and wagon of the defendant struck her in a narrow passage in the street, between the supports of the elevated railway track and the sidewalk. Others barely escaped, the wheels brushing the clothing and soiling the skirt of one of them.

We are of opinion that it was for the jury to determine whether she was exercising such care as persons of ordinary prudence should exercise under like circumstances.

Petition to prove exceptions denied; exceptions overruled.

FANNIE J. GARVEY *vs.* INHABITANTS OF REVERE.

Suffolk. November 15, 16, 1904. — March 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Damages, From change of grade in highway. *Way*, Repairs of highway. *Municipal Corporations. Damages.*

A petition under Pub. Sts. c. 52, § 15, for damages from a change of grade in a highway of a town is filed properly if it is taken to the office of the selectmen of the town and handed to one of the selectmen in the presence of two others although the board is not in session at the time and no record of the filing is made.

The grant of a location to a street railway company by the selectmen of a town required the grade of the portions of a certain street between the tracks and eighteen inches outside of the tracks to be raised, and this was done, in accordance with plans drawn by the town engineers by direction of the selectmen and under the direction of the superintendent of streets, raising the level of this part of the street about twenty-two inches above the level previously existing. There was no record that the grade of the street had been established legally at any time or that the previously existing grade had been changed. The superintendent of streets caused the street to be graded to the same height between the location of the railway and the land of the abutters. On the petition of an abutter against the town for damages from the change of grade, it was held, that the grading of the street between the location of the railway and the petitioner's land was done in the way of ordinary repairs, in regard to which the superintendent of streets was the agent of the town, and that the petition could be maintained.

At the hearing of a petition under Pub. Sts. c. 52, § 15, against a town for damages from a change of grade in a highway, it is proper to exclude evidence offered by

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the town to show that the change of grade was necessary in order that a system of drainage not authorized at the time but afterwards put in might be adopted, because the measure of damages is the difference between the value of the petitioner's property immediately before the change of grade and immediately after it, less any special benefit and advantage to his estate caused by the change of grade, and the reasons for the change of grade are immaterial.

At the hearing of a petition under Pub. Sts. c. 52, § 15, against a town for damages from a change of grade in a highway, it is proper to exclude evidence offered by the town to show that by reason of the change of grade it became possible to make certain improvements such as the construction of sidewalks and the laying of surface drainage and sewer pipes, these being improvements for which special assessments could be laid upon the abutters under the Public Statutes.

PETITION, filed February 14, 1901, under Pub. Sts. c. 52, § 15, for damages to a lot of land and buildings of the petitioner on Ocean Avenue in Revere from the raising of the grade of that avenue on or about August 1, 1900.

At the trial in the Superior Court before *Harris*, J. the jury returned a verdict for the petitioner and assessed the damages in the sum of $775. The respondent alleged exceptions, raising the questions stated by the court.

S. R. Cutler, (*S. L. Bailen* with him,) for the respondent.

B. B. Dewing, for the petitioner.

LATHROP, J. 1. The first question presented is whether the petition was properly filed with the selectmen. The evidence was that the petition was taken to the office of the board of selectmen in the town hall at Revere, at a time when the board was not in session, and was handed to one Andrews, who was a member of the board of selectmen, in the presence of two other members of the board. We are of opinion that this was sufficient. The petitioner had done all that she could do, and if the selectmen failed to make a record of the fact of the filing, or otherwise failed in their duty, such failure cannot affect the petitioner. *Erskine* v. *Boston*, 14 Gray, 216, 217. *Sisson* v. *New Bedford*, 137 Mass. 255. See also *Orne* v. *Barstow*, 175 Mass. 193.

2. On January 2, 1900, a location was granted to the Lynn and Boston Railroad for a double track on Ocean Avenue, in the following terms: "The grade of Ocean Avenue between Beach Street and Revere Street shall be raised to a grade to be established by the town, and said railroad will grade that portion of Ocean Avenue occupied by their tracks and the space between the tracks and eighteen inches outside the tracks, to the satis-

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faction of the board of selectmen." This location was accepted by the board of directors of the railroad. The street was paved to the width required by the grant of location, and the level of the street was raised under the direction of the superintendent of streets about twenty-two inches above the level previously existing. It did not appear by the records that the grade of Ocean Avenue had been legally established at any time, or that the existing grade had been changed. It was found that the changes in 1900 were made by the direction of the board of selectmen, who instructed the town engineers to draw plans making the grade high enough properly to drain the street, and to protect the pipes from freezing. The tracks were placed in the middle of the street.

It is obvious that what was done in grading the street between the location of the railway and the petitioner's land was done in the way of ordinary repairs, and that the petitioner had a right to maintain her petition. *Proctor* v. *Stone*, 158 Mass. 564, 569. *McManus* v. *Weston*, 164 Mass. 263. *Simpson* v. *North Adams*, 174 Mass. 450. The case is not one of specific repairs, nor does it fall within *Vigeant* v. *Marlborough*, 175 Mass. 459, and *Underwood* v. *Worcester*, 177 Mass. 173, relied upon by the respondent.

3. At the trial the respondent offered to prove that the raising of the grade of Ocean Avenue was necessary in order that the system of drainage, which was put in afterwards, but which was not included in the order for the alteration and had not been authorized at the time, although it was a part of the entire scheme which the engineers had in mind in making the changes, might be put in; and that the system of drainage, which was in fact subsequently put in, and which did effectually drain the surface of the street, could not have been put in if the street had not been raised as it was raised. This evidence was excluded.

We are of opinion that this evidence was rightly excluded. The measure of damages was the difference between the value of the petitioner's property immediately before the change in grade and its value immediately after, less the special benefit and advantage to her estate caused by the change of grade. The reasons which induced the municipal authorities to change the grade of the street are not material in determining either

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the damage sustained by the petitioner or the benefit received by her.

4. "At the conclusion of the evidence at the trial, the respondent requested the court to instruct the jury that if they should find that after the work described in the petition was completed, said work had rendered surface drainage or the laying of sewers possible, whereas it was impossible before; or if they should find said work rendered surface drainage easier or more efficacious than it was before said work was completed, then the jury should take that fact into consideration in estimating the benefits which the petitioner's land received from the alleged alterations on Ocean Avenue, and further asked the court to instruct the jury that in estimating the benefits received by the petitioner from the alterations on Ocean Avenue, the jury should consider the laying of the drain in said Ocean Avenue. The court refused to give the rulings requested, but instructed the jury in substance that while they might in passing on the question of damage or benefit take into consideration the fact that the town had the right to put in such things as drains and sewers at any time in the future, they could not consider the fact that such right had since been exercised after the order of alteration, as the rights of the parties became fixed upon the passing of that order. To this refusal the respondent duly excepted."

We are of opinion that the rulings requested were properly refused, and that the ruling given was sufficiently favorable to the respondent. It was found that the work subsequently done, such as the making of sidewalks and the laying of the drain and sewer, were under such circumstances as permitted the respondent, under the Public Statutes, to lay a special assessment upon the petitioner's land, for these improvements. It therefore would be unjust and inequitable to allow the benefit to the petitioner's land from these improvements to be set off against the petitioner's claim.

Exceptions overruled.

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DAVID B. NYE & another *vs.* ANDREW DUTTON.

Suffolk. November 16, 1904. — March 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Employer's liability.

An appliance does not become a part of the ways, works or machinery of an employer within the meaning of the employers' liability act until it becomes a part of the permanent structure or plant, and, if a workman is killed through the negligence of a fellow servant engaged in adjusting a new appliance to replace an old one which has been broken, his next of kin cannot recover from the employer for his death.

LATHROP, J. This is an action under the St. of 1887, c. 270, § 2, by the next of kin, namely, the parents, of Waldo E. Nye, to recover for his being instantly killed, or dying without conscious suffering, on February 9, 1900, while in the employ of the defendant. We shall assume for the purposes of the case that the plaintiffs were "dependent upon the wages of the employee" within the statute, though the evidence on this point is very meagre, and shall consider the case upon the merits.

The declaration contains two counts, both under the St. of 1887, c. 270. The first alleges a defect in the condition of the ways, works and machinery, and the second the negligence of a superintendent. At the trial in the Superior Court, at the close of the evidence for the plaintiffs, the judge directed a verdict for the defendant; and the case is before us on the plaintiffs' exceptions.

The defendant carried on the business of wholesale upholstery supplies at 18 Canal Street, Boston, occupying the basement, street floor and four floors above. There was a freight elevator on the Merrimac Street side which ran from the basement to the top floor. The power was electricity. At each floor there was an opening into the elevator well and a sliding gate or barrier consisting of two pieces of wood fastened together so as to form a right angle, the short arm being perpendicular and the long arm horizontal across the opening. An automatic device on the elevator snapped into an iron casting fastened

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to the gate, and when the elevator ascended lifted the gate to the ceiling of each floor; when the elevator passed the ceiling, the gate descended of its own weight. The iron casting on the gate at the fourth floor had been broken a day or two before the accident. One Bingham, who had charge of the whole building, and gave orders to the men, told one Hopkins to go up and fix the gate, and gave him a new iron casting like that put in evidence. Hopkins had been at work for the defendant since the September before the accident, and since the November before the accident Hopkins had had charge of the motor operating the elevator and was in charge of seeing that the elevator was kept properly oiled. Small repairs were done by Hopkins as often as by any one, and this had been his work ever since he had been there. The defendant furnished some tools, namely, files, saw, two or three hammers, screw drivers and bits, for this work.

On the day of the accident, Hopkins, after receiving the order from Bingham, went to the fourth floor with the new casting. A portion of the old casting was still fastened to the gate. The casting was attached to the gate by two bolts which passed through the wood work and through the casting and it was held in place by nuts on the ends of the bolts. Hopkins first took off the old casting and took out all the bolts, then he put one of the bolts through the lower hole and hung the new casting on it, but without putting on the nut to hold it firmly in place. While Hopkins was at work putting on the casting, Nye came up and told him to come down stairs to help put some cases on the elevator. He went down and he and Nye put some cases on the elevator and went up to the fourth floor. The cases were unloaded. Nye and the elevator went to the basement; and Hopkins resumed his work. He intended slightly to lower the casting by putting the upper bolt in the lower hole, and this made it necessary for him to bore a new hole in the gate for the lower bolt. Without securing the new casting through which he had placed the top bolt, by screwing on a nut or in any other way, he proceeded to bore a new hole in the gate for the lower bolt. He was standing on the floor at the time, leaning over the gate and measuring for the lower hole. He did not know whether he touched the gate or what, but

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the iron casting fell, point down, and struck Nye, who was at work loading cases upon the elevator in the basement, in the head. The point of the casting entered Nye's head and he died without indication of consciousness.

If it were necessary in this case to pass upon the question of due care on the part of Nye in being in the elevator while work was going on above, we should have great difficulty in holding that there was any evidence for the jury. It is apparent that he knew what was going on above him, and must have known that if anything fell he was in danger of being struck. He was nineteen years old, had worked for the defendant for four months, and knew what was going on at the time. Without passing upon this question, we prefer to rest the case upon the ground that there was no evidence of negligence of the defendant under the statute.

The first allegation of negligence is "that the fall of said piece of iron, was caused by reason of a defect or defects in the condition of the ways, works and machinery," etc. The only defective condition was the breaking of the casting several days before the accident. This defective condition caused no injury to any one. It was not the proximate cause of the accident. It was the duty of the defendant to remedy the defect, and while this was being done the accident happened through the carelessness of the fellow servant of Nye. The statute does not cover such a case. An appliance does not become a part of the ways, works and machinery until it becomes a part of the permanent structure or plant. See *Beique* v. *Hosmer*, 169 Mass. 541. In *Ashley* v. *Hart*, 147 Mass. 573, 575, it was held that the statute "does not give a right of action against the employer for the negligence of a fellow servant in handling or using a machine, tool, or appliance which is itself in a proper condition." See also *O'Connor* v. *Neal*, 153 Mass. 281.

The second count alleges negligence of the superintendent in several particulars. First, "In the failure to secure or cause to be secured said piece of iron." The answer to this is that the superintendent sent a man to secure the piece of iron, and that, while so doing, through a temporary act of negligence on the part of the workman, the accident happened. The next act of negligence alleged is that the superintendent set Nye

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to work in the elevator while the work was going on overhead. We find no evidence to support this allegation. The same answer is true of the allegation that the superintendent caused the repairs to be made by an incompetent and unskilful man, and in failing to supply him with proper tools to do the work. Lastly, it is alleged that there was negligence in failing to warn Nye that repairs were being made upon the elevator and well guards. But the evidence shows that Nye knew what was going on above him, and there was no occasion to warn him. See *Kanz* v. *Page*, 168 Mass. 217.

Exceptions overruled.

C. F. Choate, Jr., for the plaintiffs.

C. S. Knowles, for the defendant.

HENRY SOUTHER & another, trustees, *vs.* CITY OF GLOUCESTER.

Essex. December 7, 1904. — March 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Tax. Water Rates. Municipal Corporations. Practice, Civil, Agreed statement of facts.

In fixing the amount of water rates to be charged in a particular locality other things may be considered besides the amount of water used, and it may be reasonable and lawful to charge the inhabitants of an outlying section of a city as much for the water they use in only a part of the year as the inhabitants of the heart of the city are charged for the water used by them during the whole year.

The rule in regard to drawing no inferences on an agreed statement of facts unless the power to do so is given has no application to a statement of agreed facts submitted as evidence.

BILL IN EQUITY, filed August 21, 1903, to enjoin the defendant from cutting off the supply of water from a summer cottage of the plaintiffs at Bass Rocks in Gloucester.

At the hearing in the Superior Court before *Sheldon*, J., the plaintiffs introduced in evidence a "statement of agreed facts submitted as evidence." No evidence was introduced by the

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defendant. It appeared that the defendant shut off the water from cottage B. mentioned in the opinion because the plaintiffs refused to pay the full water rates charged by the defendant on the ground that they were unreasonable and not uniform with the rates charged in other parts of the city. The plaintiffs had let cottage B. to one Mrs. Burke, of Omaha, Nebraska, for a term of two months beginning August 1, 1903, for the sum of $200 and the water rates, and the premises were occupied in accordance with that agreement. On or about August 15, 1903, the water commissioners caused notice to be given to Mrs. Burke that unless the bill sent to the plaintiffs on June 1, 1903, charging $25 for water for the cottage for the year or season ending June 1, 1904, was paid immediately, the water would be shut off. Because of this notice, the plaintiffs on August 20, 1903, made a formal verbal application for a supply of water for cottage B. and tendered the defendant the sum of $12.50, one half of the annual or season rate for the cottage, which the defendant refused to receive, and threatened to shut off the supply of water unless the full rate of $25 was paid. Whereupon the plaintiffs brought this suit in equity.

St. 1895, c. 451, was accepted by the city of Gloucester in 1895, and in the same year the city acquired under the provisions of that chapter the property of the Gloucester Water Supply Company, and has since been supplying itself and its inhabitants with water, there being no other aqueduct water supply in the city.

Cottage B. was situated at Bass Rocks. Before 1895 the plaintiffs became the owners of a large tract of seashore land in an outlying section of Gloucester at Bass Rocks, laid it out into building lots, constructed private ways through the tract and sold many lots, upon which houses for summer occupancy only were erected, and upon others of these lots the plaintiffs themselves erected summer houses, which they still own. At the time the defendant acquired the water works in 1895, a water main served a small portion at one corner of this tract and a very few summer houses thereon.

Since the regulations and rates for water supplied by the defendant were established, the defendant, at the plaintiffs' urgent request made with full knowledge of the regulations and

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rates and without expressing any objection to them, at great expense owing to the rocky nature of the soil further extended its water mains or pipes at Bass Rocks and laid them in and under the private ways by license in writing from the plaintiffs, so as to supply with water nearly all the summer houses at Bass Rocks, including cottage B., thereby greatly benefiting the plaintiffs and their unsold land. These summer houses at Bass Rocks so supplied, ninety-two in all, were the only houses and consequently their owners or occupants were the only water takers there. But the laying of water pipes in some other sections of the city of Gloucester was also attended with great expense owing to the rocky nature of the soil.

The whole number of water takers in Gloucester is approximately fifty-five hundred. Included in this number are five hundred summer houses, situated for the most part in outlying sections of the city, which the defendant supplies with water each year at the rates and according to the regulations above mentioned. A majority of these houses are not occupied earlier than June 1 nor later than October 1, and some are not occupied for more than two or three months. The owners and occupants of one third of these summer houses are permanent residents of Gloucester, and the remaining two thirds are non-residents, many residing except in the summer months in distant States. To enable the defendant to supply water to an increasing number of applicants between the years 1900 and 1903 principally for summer houses, it was found necessary by the commissioners to construct during the year 1902 an additional reservoir at an expense of about $250,000.

The plaintiffs did not contend that the annual rates established by the commissioners for the use of water were unreasonable except as applied to summer houses and houses requiring a supply of water for a shorter term than one year, the income derived by the defendant from all water rates not being sufficient, within $35,000, to pay the current annual expenses of operating its water works and the interest on the water debt and the required annual payments on the principal of that debt.

The judge reported the case for determination by this court, such decree to be entered as on the facts law and justice required. The report contained the following statement by the

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judge: "So far only as it was a question of fact I found as an inference from said statement of facts that the water rates and regulations, which are a part of said statement, are uniform and reasonable except so far as they are shown as a matter of law to be either unreasonable or not uniform with reference to the plaintiffs' property by the circumstances set out in the statement of agreed facts."

D. C. Brewer, for the plaintiffs.

B. B. Jones & L. S. Simonds, for the defendant.

LORING, J. We do not stop to consider whether on the evidence before the Superior Court the plaintiffs were shown to have had any interest in the water rate for cottage B. for the year in question, for we are of opinion that the finding of fact on the merits was not wrong as matter of law. As the bill must be dismissed, even if the preliminary difficulty which we have had is overcome, we prefer to dispose of the case on the ground on which it was tried and disposed of in the court below.

The plaintiffs have undertaken to sweep aside any difference in rates charged them by reason of facts peculiar to the section of the city where the cottage in question is situated, on the ground that the construction of water works is a public use to be paid for by taxation. From this they draw the inference that all rates are to be based on the amount of water used in each instance and on nothing else.

But that is not so. It was well said in *Ladd* v. *Boston*, 170 Mass. 332, 335: "Considerable discretion in determining the methods of fixing rates is necessarily given by the statute to the water commissioner. Money must be obtained from water takers to reimburse the city wholly or in part for the expense of furnishing water. An equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker. The nature of the use and the benefit obtained from it, the number of persons who want it for such a use, and the effect of a certain method of determining prices upon the revenues to be obtained by the city, and upon the interests of property holders, are all to be considered." See in this connection *Smyth* v. *Ames*, 169 U. S. 466, 546, 547; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 757; *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, 95, 96.

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The special cost of extending the system to the "outlying section" in question, the fact that even if water is wanted there for less than a year as a rule, the interest on the cost of the necessary special construction and on the construction of the works as a whole runs throughout the year, and the fact, if it is a fact, that there are but few persons who take water in this section compared with the cost of extending the water system to it, are all of them matters which can be taken into account in fixing a reasonable rate. It is proper also to take into account the additional fact that "to enable the defendant to supply water to an increasing number of applicants therefor, between the years 1900 and 1903, principally for summer houses, it was deemed necessary by the commissioners to construct during the year 1902 an additional reservoir or water basin at an expense of about two hundred and fifty thousand dollars." There may be other matters which have not occurred to us.

It is true that the charge in question is not a charge for this district but for summer houses generally, and there are five hundred summer houses of which the plaintiffs own but ninety-two, that is to say, not quite one fifth. If the other four fifths are so situated that similar peculiar circumstances apply to them, no one could complain of this rate. The plaintiffs in any event cannot complain that some discrimination is made between them and water takers in the heart of the city, and they have gone no further than that in their proof in the case at bar. There is not enough here to enable us to say that, provided some discrimination can be made, the discrimination made is too great. The burden is on the plaintiffs to show that the rate in question is an unreasonable one, and they have not gone far enough to sustain the burden which rests on them.

The plaintiffs' objection that they are made to pay for a year in advance falls with their objection to paying as much for water in this "outlying section" for a part of the year as is paid by others for water for the whole year in the heart of the city. All rates are payable in advance.

The plaintiffs have relied on *Rockland Water Co.* v. *Adams*, 84 Maine, 472, referred to in *Turner* v. *Revere Water Co.* 171 Mass. 329, 335. It is enough to say of that decision, so far as the case now before us is concerned, that it did not appear that

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there were any special circumstances in it. The only question before the court there seems to have been whether, other things being the same, as much could be charged for water for four months as for the whole year.

The plaintiffs' citation of *Norton* v. *Brookline*, 181 Mass. 360, makes it necessary to point out that this is not a case submitted on agreed facts, that is to say, is not a case stated but a case which was tried on a "statement of agreed facts submitted as evidence."

No error in law appearing in the finding of fact made by the Superior Court the entry must be

Bill dismissed.

JOHN R. WHITNEY & another, trustees, & another, *vs.* METALLIC WINDOW SCREEN MANUFACTURING COMPANY & others.

Suffolk. December 9, 1904. — March 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Mortgage, Of real estate, redemption. *Equity Jurisdiction*, To redeem from mortgage.

The rule, that in equity a mortgagor of land cannot redeem by paying the original debt if by an oral agreement between the mortgagor and mortgagee the mortgage is to cover an additional advance of money made by the mortgagee, does not apply to a bill to redeem by an attaching creditor of the mortgagor who had no notice of the oral agreement.

LATHROP, J. This is a bill in equity, filed in the Superior Court on April 18, 1900, by the trustees under the will of Asa Whitney, against the Metallic Window Screen Manufacturing Company and the administrators of the estate of John J. Merrill, to redeem a parcel of land in Winchester from a mortgage. After an answer and a replication had been filed the case was sent to a master, who made certain findings of fact and rulings of law. Exceptions were filed by the defendants, which were heard and overruled by a judge of the Superior Court, who entered a decree dated April 30, 1904, that the plaintiffs were

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entitled to redeem by paying to the administrators of the estate of Merrill the sum of $1,566.14, with interest from January 1, 1899, at the rate of five per cent per annum; and that on payment the first named defendant should at once surrender possession of the premises. The administrators of the estate of John J. Merrill appealed.

It appears from the master's report that on January 20, 1893, the mortgage in question was executed by Frederick O. Snow to the Medford Savings Bank for $4,000, payable in three years from date, with interest at the rate of five per cent per annum during the term and for such further time as the principal sum or any part thereof should remain unpaid. Subsequently in the same year, the mill on the mortgaged premises and a house were burned, and after this, on October 25, 1893, the mortgagee assigned the mortgage, for the consideration of $4,000 and $52.78, interest, to one Kendall.

On March 20, 1895, $2,767.20 was received from insurance companies on account of the loss by fire of the mill and house, and paid to Kendall on account of the mortgage and in partial payment thereof.

On April 9, 1895, Snow conveyed the real estate, subject to the mortgage, to the first named defendant.

In January, 1896, Kendall assigned the mortgage to John J. Merrill, "in consideration of the balance of the mortgage due," and the sum of $1,699 was paid to Kendall for such an assignment.

On January 20, 1898, Merrill made a release of a part of the mortgaged premises to the first named defendant, which conveyed the part so released to the Boston and Lowell Railroad Company.

On January 29, 1898, Snow was paid by the Boston and Lowell Railroad Company the sum of $1,360, but no part of this sum was applied in reduction of the principal of the mortgage.

On March 28, 1899, the plaintiffs attached the unreleased property in an action against the first named defendant, and recovered judgment in the sum of $2,442.23. Execution issued therefor, on which $21.91 was paid in part satisfaction. On March 20, 1900, the right, title and interest which the first

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named defendant had on March 28, 1899, was taken on execution and later was sold to Arthur E. Whitney, who was acting in behalf of the plaintiffs, and subsequently he was made a party plaintiff.

The principal contention of the defendants before the master was that Merrill, before the attachment of the plaintiffs, advanced $1,338, at the request of the first named defendant, to build a factory on the premises covered by the original mortgage, under an agreement made by Merrill and Snow acting for the first named defendant, that the money so advanced by Merrill should be covered by the security of the original $4,000 mortgage, and that the plaintiffs should pay $1,338, with interest, in addition to the balance remaining due and unpaid on the original mortgage.

On this the master found that after the mill and the house were burned, and while Merrill held the mortgage, and before the attachment of the plaintiffs, he, Merrill, advanced certain sums of money which were used in building a factory on the premises covered by the mortgage; that that transaction was a loan by Merrill to Snow, the president of the first named defendant.

The master further found that the first named defendant did not make, or duly authorize any person in its behalf to make, any specific or definite agreement with Merrill, whereby Merrill should advance or lend any sum of money to be used in erecting a new factory, or for any purpose, on the land covered by the mortgage; that if there was any agreement to that effect it was not in writing; that Arthur E. Whitney did not know, nor was there any evidence that the trustees knew, of any such specific or definite agreement or arrangement, or of any agreement whatever, between Merrill and Snow.

The defendants filed numerous exceptions to these findings of the master and to his not finding in their favor, and the master has reported the evidence in relation thereto. We do not deem it necessary to discuss these exceptions in detail, because it is obvious that even if an agreement was made between Merrill and Snow as contended for, and that Snow acted for the first named defendant, this cannot bind the plaintiffs unless they or their agent, Arthur E. Whitney, knew of such agreement; and

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the exceptions as to the other findings of the master become immaterial.

The principle of law on which the defendants rely is that a court of equity will not aid a mortgagor to redeem a mortgage, although the mortgage has been paid, if the parties have agreed that the mortgage shall remain as security for a new consideration. *Joslyn* v. *Wyman*, 5 Allen, 62. See also *Stone* v. *Lane*, 10 Allen, 74; *Upton* v. *South Reading National Bank*, 120 Mass. 153; *Ford* v. *Davis*, 168 Mass. 116. The rule of *Joslyn* v. *Wyman* has been applied to the case of a second mortgagee seeking to redeem, who, when he receives his mortgage, has knowledge of the facts relating to the first mortgage. *Taft* v. *Stoddard*, 142 Mass. 545. This rule has, however, no application to a subsequent mortgagee or to an attaching creditor, or to a *bona fide* purchaser. Per Dewey, J. in *Joslyn* v. *Wyman*, *ubi supra*. This is certainly so if such a one has no knowledge of the facts respecting the first mortgage. The rule does not apply where there is no agreement but merely an indefinite understanding. *Brooks* v. *Brooks*, 169 Mass. 38. See also *Douglas* v. *Stetson*, 159 Mass. 428, and *Nourse* v. *Jennings*, 180 Mass. 592, for other cases where the rule has been held not to be applicable.

An attaching creditor stands in the position of a purchaser for value. *Priest* v. *Rice*, 1 Pick. 164. *Coffin* v. *Ray*, 1 Met. 212. *Woodward* v. *Sartwell*, 129 Mass. 210, 212.

There is nothing in the evidence in this case to show that the trustees had any knowledge of the agreement, nor that Arthur E. Whitney had. It appears from his testimony that he had heard that there was a four thousand dollar mortgage; but this is immaterial. He was not put upon inquiry to ascertain how much was due on this mortgage beyond what the records disclosed. The records showed that the mortgage had been reduced, for the assignment from Kendall to Merrill was "in consideration of the balance due."

As attaching creditors the plaintiffs had a right to redeem, and they cannot be said to have had notice from the records of an unknown equity which was not disclosed on the records. *Briggs* v. *Rice*, 130 Mass. 50.

The final decree of the Superior Court must be affirmed, the

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sixty days within which the plaintiffs may redeem to be reckoned from the day of the filing of the rescript of this court in the Superior Court, and interest on the sum to be paid to be reckoned up to the time of payment.

So ordered.

M. H. Browne, (*J. M. Browne* with him,) for the administrators of the estate of John J. Merrill.

C. F. Jenney & S. Robinson, for the plaintiffs, were not called upon.

EDWIN L. GOULD *vs.* WILLIAM J. HARTLEY.

Suffolk. January 9, 1905. — March 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Evidence, Book entries.

In an action of contract by the proprietor of a hotel for the price of liquors and cigars, the plaintiff cannot put in evidence the entries in a book kept by a clerk in the office of the hotel made from slips brought to him by bell boys from the bar and the cigar department, the clerk having no personal knowledge of the sales and the original slips not being produced.

CONTRACT by the proprietor of a hotel upon an account annexed with thirty items amounting in all to $210.50. Writ in the Municipal Court of the City of Boston dated August 13, 1903.

On appeal to the Superior Court the case was tried before *Aiken*, J., without a jury. The plaintiff to establish a portion of the items charged in his account introduced original memoranda signed by the defendant, and to establish other items, being charges for liquors and cigars, offered in evidence a book alleged to have been kept in the usual course of the plaintiff's business, the entries in which were made in the manner described in the opinion. The judge admitted the book entries against the defendant's objection. The judge found for the plaintiff in the sum of $168.90; and the defendant alleged exceptions.

J. H. Blanchard, for the defendant.

W. J. Gaffney, for the plaintiff, submitted a brief.

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LATHROP, J. While the plaintiff to prove some of the items of the account put in evidence memoranda with the defendant's signature attached, as to the other items the only offer of proof was a book alleged to have been kept by the plaintiff in the usual course of his business. This book was kept by a clerk in the office of the hotel, who had no personal knowledge of the items of goods sold by the cigar department and the bar department of the plaintiff's hotel, and whose only knowledge was derived from slips sent to his office from these departments by a bell boy. The original slips were not produced, and neither of the employees who had charge of the bar or the cigar department was called to testify.

Under these circumstances we are of opinion that the judge erred in admitting the book in evidence. This was decided in *Kent* v. *Garvin*, 1 Gray, 148, and the rule there laid down has been recognized ever since to be the law. *Harwood* v. *Mulry*, 8 Gray, 250, 252. *Miller* v. *Shay*, 145 Mass. 162. *Donovan* v. *Boston & Maine Railroad*, 158 Mass. 450, 453. The books of a bank stand on a different footing. *Produce Exchange Trust Co.* v. *Bieberbach*, 176 Mass. 577, 587.

Exceptions sustained.

CAROLINE W. MERRILL & others *vs.* WILLIAM F. WEBSTER & others.

Middlesex. January 11, 1905. — March 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Devise and Legacy. Trust.

The will of a married woman left all her property real and personal to her husband, "to have and to hold the same to him, his heirs, executors, administrators and assigns forever," and added: "It is my will, in consideration of the fact that I have heirs who are worthy, that my said husband shall leave by his will after my decease, should I decease before him, the property of whatever kind to my heirs." *Held*, that the absolute devise of the real estate to the husband in fee was not affected by the subsequent clause attempting to reduce the fee to a life estate, and that no trust was created for the benefit of the heirs of the testatrix.

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LATHROP, J. This is a writ of entry to recover possession of a parcel of land in Cambridge. The case was heard in the Superior Court, without a jury, on agreed facts, before the late Chief Justice of that court, who, after a finding for the tenants, reported the case for our determination. The facts in the case, so far as material to our decision, are these.

On April 22, 1878, Eliza E. Webster, then owning the land in question, died leaving a will which was duly admitted to probate. The will, after directing her executor to pay her just debts and appointing her husband as executor, proceeds as follows:

"And as to my worldly estate and all the property real, personal and mixed of which I shall die seised and possessed, or to which I shall be entitled at the time of my decease, I give, devise and bequeath to my said husband William F. Webster, to have and to hold the same to him, his heirs, executors, administrators and assigns forever.

"It is my will, in consideration of the fact that I have heirs who are worthy, that my said husband shall leave by his will after my decease, should I decease before him, the property of whatever kind to my heirs."

William F. Webster after the death of Eliza E. married again, and died about 1889, leaving a wife and five children. By his will he left all his property to his wife and children. His wife died intestate on or about November 2, 1889, leaving as her only heirs at law her five children.

The demandants represent the heirs of Eliza E. Webster, and the tenants are the children of William F. Webster and his second wife.

The only question which we need consider is the construction of the will. There can be no question that the devise to the husband gave him the fee in the land. The testatrix then attempted to cut down this fee to a life estate, but this she could not do. Such attempts have been often made in this Commonwealth, but never have been successful. The ground upon which our decisions rest is that where a fee is given, a subsequent limitation, being merely an attempt to take away one of the rights inseparable from the estate devised, cannot stand with that devise. *Damrell* v. *Hartt*, 137 Mass. 218. *Bassett* v. *Nickerson*, 184 Mass. 169, 176, and cases cited.

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We find nothing in the will to indicate that the testatrix intended that her husband should hold the property in trust for her heirs.

Judgment on the finding.

F. P. Garland & E. D. Wright, for the demandants, submitted a brief.

G. A. A. Pevey, for the tenants.

MARTIN COMERFORD *vs.* CITY OF BOSTON.

Suffolk. January 12, 1905. — March 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Way, Defect in highway.

Under Pub. Sts. c. 52, § 18, (R. L. c. 51, § 18,) it is a question of fact for the jury whether a city had, or by the exercise of proper care and diligence might have had, reasonable notice of a defect in a highway consisting of the depression of a sidewalk below the curbstone of nearly or quite two inches, if it appears that the street was a much travelled one and that the inner side of the curbstone above the depression was pretty nearly black, and stained, old looking and dirty.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff by an alleged defect in a public highway in the city of Boston, on March 16, 1901. At the trial in the Superior Court the plaintiff testified that he was going down Tremont Street in a southerly direction, and started to cross from the easterly side of Berkeley Street to the opposite corner of Berkeley Street and Warren Avenue; that as he was passing from the sidewalk to the cross walk leading diagonally across to the corner of Berkeley Street and Warren Avenue, he tripped against the curbstone and fell upon the flagging of the cross walk; that when he got up he hobbled back to see what tripped him, and found that the sidewalk at the curbing "had settled down and the curbing was projecting up," and that the sidewalk was depressed about two inches below the level of the curbstone, for a distance of six or eight feet.

The plaintiff further testified that Berkeley Street at the

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point where the accident occurred was a much travelled highway; that there was a church on one corner of Warren Avenue and Berkeley Street, and an Odd Fellows' Building on the other. There were also stores and restaurants on the first floors of the other buildings, and there were street railway tracks in Berkeley Street.

A witness for the plaintiff testified that three days after the accident he went to the place of the accident and measured the depression and found it to be "a strong inch and a half," and he would say an eighth of an inch over, probably. He further testified that the facing of the inside of the curbstone, the inch and a half, was "pretty nigh black"; and, when asked what he meant by that, he answered: "Stained, old-looking, dirty."

A captain of police testified for the defendant that after the accident, and after he had received notice of it, he measured the depression and found it to be a quarter of an inch in some places, and half an inch in others; that in his opinion the depression was owing to the action of the frost in the spring-time. On cross-examination, the witness testified that he did not know whether the frost caused the depression or not, nor when the frost caused it.

At the close of the evidence the defendant requested the judge to rule that there was no evidence in the case which would warrant the jury in finding that the alleged defect had existed such a length of time that the city knew of it, or by the exercise of reasonable care and diligence might have known of it in season to have remedied it, and prevented the injury to the plaintiff. The defendant also asked the judge to rule that, on all the evidence, the plaintiff could not maintain the action. The judge declined to give the rulings requested. The jury returned a verdict for the plaintiff; and the defendant excepted to the refusal to give the rulings requested.

The only argument addressed to us in support of the second request is that the first request should have been given.

At the time of the accident the Pub. Sts. c. 52, § 18, were in force. This statute was based upon the St. of 1877, c. 234, § 2, and the law is now to be found in the R. L. c. 51, § 18. At the time of the accident there could be no recovery for a defect in a highway of a city or town, unless it "had reasonable notice of

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the defect, or might have had notice thereof, by the exercise of reasonable care and diligence."

The defendant has argued this case as if the language just cited is first to be found in the St. of 1877, c. 234, § 2; and its counsel complains that in the last paragraph of the opinion in *Welsh* v. *Amesbury*, 170 Mass. 437, the court has cited cases all of which but one were prior to the St. of 1877. A brief statement of the legislation on this subject will show that the provision in question is of much earlier origin. It goes back to the St. of 1786, c. 81, § 7, where the language is "in case they had reasonable notice of the defect." This section was changed by the Rev. Sts. c. 25, § 22, by adding after the words "by reason of any defect or want of repair" the words "which has existed for the space of twenty-four hours." The section however retained the clause in substance of the St. of 1786, c. 81. The St. of 1850, c. 5, repealed the Rev. Sts. c. 25, § 22, but enacted a new section giving a right of action in such a case, where there was reasonable notice of the defect, want of repair, etc., "or if the same had existed for the space of twenty-four hours previous to the occurrence of the injury or damage." This was the first statute under which a time was fixed which gave a right of action irrespective of reasonable notice. This was incorporated in the Gen. Sts. c. 44, § 22.

The St. of 1877, c. 234, repealed the Gen. Sts. c. 44, § 22, and made the liability depend upon the fact that the town or place "had reasonable notice of the defect or might have had notice thereof by the exercise of proper care and diligence on their part." While the latter part of this section is new in its statutory form, yet it is merely embodying in the statute what was in 1832 declared by Chief Justice Shaw, in *Reed* v. *Northfield*, 13 Pick. 94, 98, to be the law then existing. "We are also of opinion, that the evidence of notice to the town, of the dilapidation of the highway and bridge complained of, was rightly left to the jury. It has often been held, in giving a construction to this act, that notice to the town, of the defect of a highway, may be inferred from its notoriety, and from its continuance for such a length of time, as to lead to the presumption, that the proper officers of the town did in fact know, or, with proper vigilance and care, might have known the fact. This

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latter is sufficient, because this degree of care and vigilance they are bound to exercise, and therefore, if in point of fact they do not know of such defect, when by ordinary and due vigilance and care they would have known it, they must be responsible, as if they had actual notice."

The criticism of the counsel for the defendant is thus shown to be without foundation.

In the case before us we are of opinion that it was a question of fact for the jury whether, in view of all the circumstances of the case, the defendant had reasonable notice of the defect, or with proper care and diligence ought to have known of it. There was evidence that the street was a much travelled one, and the jury might well infer from the appearance of the inner side of the curbstone, that the subsidence of the sidewalk had existed for some length of time. *Reed* v. *Northfield*, 13 Pick. 94, 98. *Harriman* v. *Boston*, 114 Mass. 241. *Olson* v. *Worcester*, 142 Mass. 536. *Noyes* v. *Gardner*, 147 Mass. 505. *Welsh* v. *Amesbury*, 170 Mass. 437, and cases cited.

There are undoubtedly cases where this court has held that there was no evidence for the jury, and the defendant relies upon these. Some of these are cases where the defect is under ground, and the person injured steps upon an apparently sound surface which gives way, as in *Stoddard* v. *Winchester*, 154 Mass. 149, *Parker* v. *Boston*, 175 Mass. 501, *Brummett* v. *Boston*, 179 Mass. 26, and *Miller* v. *North Adams*, 182 Mass. 569. Or where there is no evidence whatever how long the defect had existed, as in *Stanton* v. *Salem*, 145 Mass. 476, and *Dwyer* v. *Boston*, 180 Mass. 381.

The case at bar is clearly distinguishable.

Exceptions overruled.

S. M. Child, for the defendant.

T. H. Dowd, for the plaintiff.

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COMMONWEALTH *vs.* AMÉDÉ A. POULIN.

Plymouth. January 17, 1905. — March 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Intoxicating Liquors. Words, "At wholesale."

A sale of a quart of native wine cannot be found to be a sale at wholesale within the meaning of R. L. c. 100, § 1, permitting the sale of wine at wholesale by the original maker thereof at the place of manufacture and not to be drunk on the premises.

LATHROP, J. This is an indictment for exposing and keeping for sale intoxicating liquors at Brockton on August 12, 1903, and on other days between that day and November 12, 1903, with intent to sell the same within the Commonwealth.

The case was tried in the Superior Court on an agreed statement of facts, from which it appeared that the defendant was a maker of native wines at Brockton, and that on August 12, 1903, he made a sale of one quart of native wine, not to be drunk on the premises, the same being made by him on the premises. It further appeared from the agreed facts that Brockton was a city in which licenses of the first five classes mentioned in the R. L. c. 100, § 18, were not, at the time of the sale, granted for the sale of intoxicating liquors.

On the agreed facts the presiding judge instructed the jury that the sale of a quart of native wine was a sale by retail. The jury returned a verdict of guilty, and the case is before us on the defendant's exception to the above instruction.

Section 1 of c. 100 of the R. L. as amended by the St. of 1903, c. 460, provides: "No person shall sell, or expose or keep for sale, spirituous or intoxicating liquor, except as authorized in this chapter." The section then goes on to provide for sales made by a person under a provision of law which requires him to make sales of personal property, and provides for sales of cider. The section concludes as follows: "Nor shall the provisions of this chapter apply to sales of wine at wholesale by the original makers thereof at the place of manufacture and not to be drunk on the premises."

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The defendant contends that the sale of a quart of native wine is not *prima facie* a sale by retail, and that it was a question for the jury, under proper instructions, whether the sale was by wholesale or by retail. It seems to us however clear that the construction of the statute was a question of law for the court and not one for the jury. Nor can we doubt that the government in this case made out a *prima facie* case, and that the instruction given was correct. In *Commonwealth* v. *Kimball*, 7 Met. 304, 308, it is said by Dewey, J., "To retail is to sell in small quantities." While the statute before us does not define the words "at wholesale," these words are used in opposition to the words "at retail," and mean in large quantities. A sale of a quart of native wine cannot be said to be a sale at wholesale. *State* v. *Lowenhaught*, 11 Lea, 13. *Webb* v. *Baird*, 11 Lea, 667. *Gorsuth* v. *Butterfield*, 2 Wis. 237. *Tripp* v. *Hennessy*, 10 R. I. 129. *People* v. *Abraham*, 16 App. Div. (N. Y.) 58.

Exceptions overruled.

L. F. Garfield, for the defendant.

Asa P. French, District Attorney, for the Commonwealth.

CATHERINE McGEE *vs.* BOSTON ELEVATED RAILWAY COMPANY.

ROSANNA McGEE *vs.* SAME.

SARAH McNEIL *vs.* SAME.

MABEL DOWNEY *vs.* SAME.

Suffolk. January 10, 1905. — March 6, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence. Elevated Railway. Ice and Snow.

A person knocked down by the falling of a quantity of snow from above while he is walking under the elevated structure of a street railway company cannot hold the company liable for an injury thus caused if he cannot show where the snow came from and it is purely a matter of conjecture whether it came from the elevated structure.

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LATHROP, J. These are four actions of tort brought by four girls, for personal injuries alleged to have been received by them on December 9, 1901, while passing along the sidewalk of Harrison Avenue in Boston, near Beach Street. The declaration in each case alleges the negligence of the defendant, its agents and servants, in throwing or causing to fall upon the plaintiffs from the overhead tracks of the defendant a large quantity of snow and ice. In the Superior Court the cases were tried together, and at the close of the evidence for the plaintiffs the judge directed a verdict for the defendant in each case; and the cases are before us on the plaintiffs' exceptions.

It seems to us that the judge was clearly right in giving the ruling excepted to. The only witnesses called were the plaintiffs and the weather forecaster in the employ of the United States in Boston. The plaintiffs testified merely to the fall of a quantity of snow which knocked them down while they were walking under the elevated structure of the defendant. The weather forecaster testified that it appeared from his records that there was a snow storm on December 3 and 4, amounting in all to nine inches; that the temperature was below freezing on the 5th, 6th and 7th; that it did not rise above the freezing point until midnight; and that it had reached the thawing point at 8 P. M. on the 8th, and was thawing slightly until the following morning at eight o'clock, when he should expect it to thaw substantially.

While the testimony of the last witness shows a thaw on the morning of the accident, the testimony of the plaintiffs fails to show where the snow came from, whether from the elevated structure or from the buildings abutting on the sidewalk, which were owned by other persons than the defendant. It is purely a matter of conjecture where the snow came from. The burden of proof was upon the plaintiffs to show that the snow came from the defendant's structure, and this they have not done. *Kendall* v. *Boston*, 118 Mass. 234. *Corcoran* v. *Boston & Albany Railroad*, 133 Mass. 507. *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572, and cases cited.

At the argument it was contended that the snow might have come from the roof of a building occupied by the defendant and used by it as a station from which steps proceed to the

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tracks above. This building appears from the photographs put in evidence by the plaintiffs to be a small one story building with a flat roof. It is obvious that snow could not have come from this building by force of gravity, and there is no evidence that the roof was being cleared by manual labor. The whole matter is left still in conjecture.

Exceptions overruled.

J. J. Feeley, (*R. Clapp* with him,) for the plaintiffs.

E. P. Saltonstall & S. H. E. Freund, for the defendant.

F. & M. SCHAEFER BREWING COMPANY *vs.* HENRY MOEBS & others.

Suffolk. December 5, 1904. — March 25, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Equity Jurisdiction, To reach and apply equitable assets. *Fraud*, As against creditors.

In a suit in equity to reach and apply to the payment of a debt property alleged to have been conveyed by the debtor to his sons in fraud of creditors, if it appears that the debt due to the plaintiff is a little over $6,000, that the property conveyed to the sons was worth $4,100, and that the debtor owed his sons $2,600, it may be found that there was no fraud in the transaction, a mere preference of particular creditors not being a fraud apart from statute.

LATHROP, J. This is a bill in equity, filed in the Superior Court on May 12, 1902, under the R. L. c. 159, § 3, cl. 8, to reach and apply in payment of a debt property alleged to have been conveyed in fraud of creditors by Henry Moebs, the first named defendant, to the other defendants, his sons.

The case was sent to a master who found the following facts. At the time of the conveyances hereinafter referred to, Henry Moebs had been engaged in business in Boston for about twenty-six years, at 193 Hampden Street, where he conducted a restaurant and a wholesale and retail liquor business, with a bottling establishment. He had licenses of the first, fourth and fifth classes. His three sons were employed by him in the business, two of them as bartenders at weekly wages, and the other,

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Joseph, being in charge of the bottling establishment on a commission. The three sons lived at home with their father, but it did not appear that any of them except Joseph paid for board and lodging. At the time of the conveyances and for some time before the father was afflicted with rheumatism, and was unable properly to attend to business. For a period of over five years, the sales in the business had been falling off, so that at the time of the conveyances it was being conducted at little or no profit.

On April 10, 1901, the father sold to his son Joseph three horses, two delivery wagons, one buggy and some harnesses, for an expressed consideration of $600. This consideration consisted of a previous loan in the form of a check for $502.80, dated January 7, 1901, and deposited in the bank on April 10, 1901, and the balance, $97.20, was paid in cash on the day of the sale. These chattels remained in the possession of the father and were used by him in his business until April 28, 1902.

On the last named day the father gave to his three sons a bill of sale of all the fixtures of the establishment 193 Hampden Street, for an expressed consideration of $600, which was paid in cash by one of the sons. He was also indebted to this son in the sum of $200, and he owed Joseph $1,200. These sums formed part of the consideration.

The master treated the two conveyances as one transaction, and found that the good will of the business was included, though not specifically mentioned.

Against the objection of the defendants, the master ruled that the good will of the business included the licenses, and admitted evidence of the value of a first class liquor license in 1902 for purposes of transfer subject to the approval of the police commissioners of Boston. This value he found to be on April 28, 1902, $1,900. It was admitted that new licenses for the year beginning May 1, 1902, were issued to the sons, and that the father sent a letter to the police commissioners, asking and consenting that this be done.

The master further found that on April 28, 1902, the father was owing and unable to pay other debts than the one due the plaintiff, and that the father at that time informed his sons of his financial condition.

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The master also found that the amount due the plaintiff was $6,076.35, in May, 1902, when the demand was made; that the actual value of the property conveyed, including $1,900 for the license and $300 for the good will, was $4,100; and that the consideration paid by the sons in cash and money due them from the father amounted to $2,600.

The master ruled that there was a sufficient consideration to support the conveyance; and that the above mentioned acts did not constitute such a fraud as was necessary to invalidate the conveyance.

The master stated in his report that there was no other evidence tending to show that the father had derived any benefit or advantage from the transfer, and found that the conveyance was not made in fraud of creditors; that the bill should be dismissed as against the sons, and that judgment should be rendered against the father in the sum of $6,082.15.

The plaintiff and the first named defendant filed objections and exceptions to this report. The Superior Court overruled the plaintiff's exceptions and three of the first named defendant's exceptions, and sustained the other exceptions. In other respects the report of the master was confirmed, and a decree was entered establishing the plaintiff's claim in the sum of $6,082.15, with interest and costs, and dismissing the bill as against the sons with costs in the sum of $10 to each of them. From this decree the plaintiff appealed to this court.

As we understand the decree the Superior Court disallowed these items of the master's report, namely, $300 for the good will, and $1,900 for the value of the license. We are of opinion that the Superior Court was justified in finding that the value of the good will of the business was worth nothing in view of the finding of the master that for a period of over five years the sales in the business had been falling off, so that at the time of the conveyances it was being conducted at little or no profit.

Whether the Superior Court was right in deducting the $1,900 which the master found to be the value of the license, is a matter of more difficulty. The considerations in favor of the deduction are that the license expired in two days from the time of the conveyance on April 28. It was not transferred to the sons, and, if they carried on the business from April 28 to May 1,

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they did it without a license; and under our laws a license is personal to the licensee. St. 1885, c. 83, § 1. On the other hand, the master has found, as we have seen, that a license has a value for the purpose of transfer, under the practice of the police commissioners of the city of Boston. In some cases in bankruptcy it has appeared in evidence that the police commissioners in Boston sometimes allow a license to be surrendered to be cancelled, and in place of it another to be issued to the new firm or persons applying for it. In such a case it has been held that a bankrupt may be compelled by a bankruptcy court to surrender his license to the trustee in bankruptcy. *In re Fisher*, 98 Fed. Rep. 89; *S. C.* on appeal, *nom. Fisher* v. *Cushman*, 103 Fed. Rep. 860. The decision in the case of *In re Becker*, 98 Fed. Rep. 407, proceeded on the ground that the laws of Pennsylvania allowed a license to be transferred subject to the approval of the court of quarter sessions. It is indeed said in *In re Brodbine*, 93 Fed. Rep. 643, 644: "It has already been held that the right to apply for a renewal of a liquor license in Boston passes to the trustee in bankruptcy." We are informed by the learned judge of the District Court who wrote the opinion that the case referred to is not reported, and that the statement is inaccurate in "that, strictly speaking, there may be no legal right to apply for a liquor license." The point of the decision referred to was that a court of bankruptcy may require a bankrupt to assign his license to the trustee in bankruptcy, as was decided later on in the cases above cited.

We do not, however, find it necessary to determine whether the master or the judge of the Superior Court was right as to the license, for in either event we should reach the conclusion arrived at by the decree.

The master found that the conveyance was for a sufficient consideration. We cannot say, as matter of law, that there was so great a difference between the consideration paid and the value of the assets that the finding of the master was not justified. Inadequacy of consideration is generally held to be evidence of fraud but not necessarily conclusive. See *Bayspoole* v. *Collins*, 18 W. R. 730; *S. C.* on appeal, L. R. 6 Ch. 228.

The master also found that there was no fraud; and there

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was no evidence of a secret trust in favor of the first named defendant. The most that can be said is that there was a preference in favor of particular creditors. But a preference is not a fraud at common law. *Banfield* v. *Whipple*, 14 Allen, 13. *Giddings* v. *Sears*, 115 Mass. 505. *Carr* v. *Briggs*, 156 Mass. 78. See also *Edwards* v. *Barnes*, 167 Mass. 205.

We have not dealt with the plaintiff's exceptions seriatim, but we have covered the questions of law raised thereby.

It remains to consider some of the cases cited by the plaintiff in support of its contention that in any event it is entitled to the difference between the amount of assets received by the sons and the consideration paid by them. The cases cited in support of this proposition are not cases of an absolute sale for a valuable consideration, but are cases where there was a voluntary gift with no consideration. *Parkman* v. *Welch*, 19 Pick. 231, 235, 236. *Norton* v. *Norton*, 5 Cush. 524, 528. *Harmon* v. *Osgood*, 151 Mass. 501, 505.

We find nothing else which requires discussion.

Decree affirmed.

F. H. Stewart, for the plaintiff.

G. W. Anderson, for the defendants, submitted their case without an argument or brief.

HARRIET L. WITHINGTON & others *vs.* JOHN C. NICHOLS.

Norfolk. January 11, 1905. — March 25, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Landlord and Tenant.

Where a lease of real estate, under which the rent is payable on the first day of every month during the term, gives the lessee the right to purchase the property during the term, and the lessee exercises the option and tenders the purchase money on the twenty-ninth day of a month, and refuses to pay rent after the first day of the month in which he has made the tender, the lessor may recover the proportional part of the rent under R. L. c. 129, § 8, the contingency of purchase by the lessee under the provision of the lease which has terminated the estate of the lessor being such a contingency as is provided for by the statute.

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LATHROP, J. This is an action of contract in two counts. The first is for rent, and the second is on an award. The facts in the case as they appear in the agreed statement of facts may be stated thus.

On May 19, 1902, the plaintiffs leased to the defendant certain premises in Brookline for the term of twenty-two and a half months, beginning on June 15, 1902, at the rate of $800 a year, payable in equal monthly payments, the first to be paid pro rata on July 1, 1902, and those remaining on the first day of each month following. The lease contained this clause: "It is further understood and agreed that the said lessee shall have the privilege of purchasing the above property, at $9000, during the term of this lease; and in case of such purchase being made, a commission of one and one fourth per cent is to be paid to Frank A. Russell by each of the parties hereto." The lease provided that the lessee should pay all water and gas rates, but contained no provision as to taxes.

The defendant entered upon the premises, under the lease, on or about June 15, 1902, and continued to occupy the same until October 29, 1902, when he made a tender to the plaintiffs of $9,112.50, being the consideration named in the lease for the purchase of the premises and the commission due to Russell, and demanded a deed of the premises. The plaintiffs contended that the defendant should pay the pro rata share of the taxes for the year 1902, and also the rent of the premises from October 1 to October 29, 1902. The defendant refused to pay any part of the rent or taxes.

The parties thereupon agreed to submit their differences to arbitration, agreed upon an arbitrator, and submitted to him two questions concerning the lease. The first question related to the taxes and need not be stated. The second question was as follows: "Under said agreement is John C. Nichols bound in law or in equity to pay anything for the use and occupation of said premises since the first day of October, 1902? If so, how much?"

On November 5, 1902, the arbitrator made an award that the lessor should pay the taxes for 1902, and as to the rent the award was as follows: "In regard to the question of rent, I am not so clear on the law in the matter, it being a case where a convey-

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ance is made to the tenant, and there being no one who could collect rent from him after the present owners are dispossessed of their title. It seems to me, however, just and equitable that Mr. Nichols should pay rent from October 1st to October 29th."

The defendant remained in possession of the premises until November 7, 1902, on which date the plaintiffs delivered to him a deed thereof, and paid all taxes thereon for 1902; but the defendant never has paid any part of the rent which accrued after October 1, 1902.

On these facts the Superior Court found for the plaintiffs in the sum of $69.50, of which amount $5.12 was interest from the date of the writ, February 3, 1903, to June 1, 1904.

The principal question arising under the first count is whether the case falls within the R. L. c. 129, § 8; and we are of opinion that it does. The section refers to apportionment of rent. It reads: "If land is held by lease of a person who has an estate therein determinable on a life or on a contingency, and such estate determines before the end of a period for which rent is payable, . . . the landlord . . . may, in an action of contract, recover a proportional part of such rent according to the portion of the last period for which such rent was growing due which had expired at such determination." This statute had its origin in the St. of 1869, c. 368, and appears in the Pub. Sts. c. 121, § 8. In *Adams* v. *Bigelow*, 128 Mass. 365, the words "or on any contingency" in the St. of 1869, were held not to apply where the owner of land subject to a mortgage leased it, and after the mortgagee entered to foreclose demanded the rent, and the tenant soon after paid the rent to him. It was said by Mr. Justice Endicott: "But these words, taken in the connection in which they are used, clearly refer to the happening of some event affecting the nature and character of the estate itself, and an essential and necessary part of it, upon which the continuance of the estate depends."

In *Emmes* v. *Feeley*, 132 Mass. 346, the St. of 1869 was held not to apply to a case where between two rent days the estate of a tenant at will had been terminated by a sale of the land by the landlord to a third person. See also *Hammond* v. *Thompson*, 168 Mass. 531.

In the case at bar, by the terms of the lease, the estate con-

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veyed to the lessee was subject to the contingency of the lessee exercising his option to purchase. This was an event affecting the nature and character of the estate itself, and was an essential and necessary part of it. The plaintiffs therefore were entitled to recover.

This view of the case renders it unnecessary to consider the effect of the award or whether the parties by entering into arbitration undertook to oust the courts of their jurisdiction. See *Jones* v. *Brown*, 171 Mass. 318, 324, and cases cited.

Judgment affirmed.

E. D. Sibley, for the defendant.

J. Herbert, for the plaintiffs, submitted their case without an argument or brief.

ROLLIN E. HARMON, Judge of Probate, *vs.* WILLIAM J. McDONALD, administrator, & others.

Essex. November 18, 1904. — April 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Bankruptcy. Executor and Administrator. Bond.

Where an administrator commits a breach of his bond and dies, and thereafter one of the sureties on his bond files a petition in bankruptcy and obtains a discharge, the discharge is a bar to an action against the bankrupt as surety on the bond, as the claim might have been proved in the bankruptcy proceedings. *Whether* the same rule applies in a case where the administrator has not died and there may be future breaches of his bond, *quære*.

LORING, J. This case was submitted to the Superior Court on an agreed statement of facts, from which it appeared that on June 12, 1899, one Kelley was appointed administrator of the estate of one Harney, and gave bond as such administrator, with the defendant Maguire and one Whitney as sureties.

The estate consisted of $1,088.04 in a savings bank. The administrator drew out $1,085 (leaving $3.04), appropriated it to his own use, and died. Afterwards the plaintiff was appointed administrator *de bonis non* of the estate of Harney, and brought a petition for leave to bring an action on the

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administrator's bond. This was granted on July 30, 1900, and on October 8, 1900, the writ was taken out in the action now before us. On October 11, 1900, Maguire filed a petition in bankruptcy, and received his discharge on November 27, 1900. No proof was made against the estate in bankruptcy founded on this misappropriation by Kelley.

It does not appear when Kelley the administrator died, but it was before October 8, 1900, the date of the writ in the action now before us.

The Superior Court directed judgment to be entered for the plaintiff against the administrator of Kelley and the sureties. Maguire, one surety, has appealed. We are of opinion that his appeal must be sustained.

The ruling evidently was based on what Chief Justice Shaw said at the end of the opinion in *Loring* v. *Kendall*, 1 Gray, 305, 316, 317. But the decision made in *Loring* v. *Kendall* does not support the ruling made in the case at bar. What was decided in *Loring* v. *Kendall* was that a discharge in bankruptcy does not bar an action on a bond to recover for breaches committed after the date of the petition in bankruptcy in which the discharge was granted, where there were no breaches before the date of said petition. The case at bar is a case where the administrator died after committing the breaches here complained of and before the surety filed his petition in bankruptcy; and therefore there could be no subsequent breaches. In such a case as that now before us, those damaged by the prior breaches have a right to participate in the assets of the bankrupt, and for that reason are barred by a discharge granted in bankruptcy proceedings subsequently begun. *Paddleford* v. *State*, 57 Miss. 118. *Woodard* v. *Herbert*, 24 Maine, 358. *Steele* v. *Graves*, 68 Ala. 17. *Fowler* v. *Kendall*, 44 Maine, 448. *Dyer* v. *Cleaveland*, 18 Vt. 241. For cases like *Loring* v. *Kendall*, in which it is held that a prior discharge does not bar future breaches, see *Eberhardt* v. *Wood*, 2 Tenn. Ch. 488, affirmed in 6 Lea, 467; *Jones* v. *Knox*, 46 Ala. 53; *Reitz* v. *People*, 72 Ill. 435; *McMinn* v. *Allen*, 67 N. C. 131; *McDonald* v. *State*, 77 Ind. 26. Such cases come within *Deane* v. *Caldwell*, 127 Mass. 242; *McDermott* v. *Hall*, 177 Mass. 224; *Mann* v. *Houghton*, 7 Cush. 592.

The cases of *Murray* v. *Wood*, 144 Mass. 195, and *In re Wise-*

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man, 123 Fed. Rep. 185, relied on by the plaintiff, are cases where the right to sue on the bond had not become complete at the date of the bankruptcy proceedings. *Murray* v. *Wood* was an action on a guardian's bond. The condition of a guardian's bond is: "At the expiration of his trust to settle his account in the Probate Court or with the ward or his legal representatives, and to pay over and deliver all the property remaining in his hands or due from him on such settlement." R. L. c. 149, § 1, cl. 4. Until the amount due has been settled in the Probate Court no action can be maintained against the guardian. But that is not the condition of the bond of an administrator. On the contrary when the Probate Court is of opinion that there has been a breach of the bond the amount due is settled in an action on the bond after authority to bring such action has been given by the Probate Court, when authority to bring suit is necessary, as to which see R. L. c. 149, § 23. And, as we have said, such authority was given in the case at bar on July 23, 1900. The right to put the bond in suit thereby had become complete.

In re Wiseman, the other case relied on by the plaintiff, was an action on an administrator's bond, but in Pennsylvania the right to bring an action on an administrator's bond does not become complete until a devastavit has been established in the Orphans' Court or at law. See Pepper & Lewis' Digest, (Penn.) 1471, pl. 84 and note; *Commonwealth* v. *Stub*, 11 Penn. St. 150; *Commonwealth* v. *Evans*, 1 Watts, 437. In the last of these cases it is pointed out that the law is otherwise in Massachusetts.

The difficulty which Chief Justice Shaw was dealing with at the end of the opinion in *Loring* v. *Kendall* is that which arises where there have been breaches of the bond before the date of the bankruptcy proceedings, and there may be breaches after that date. His difficulty seems to have been that but one judgment is ever entered on a bond; that that judgment is for the penal sum, and stands for the protection of persons thereafter suffering from future breaches, as well as for the plaintiff who has brought suit on the bond to recover for past breaches; that on proof of breaches subsequently occurring, execution is to issue under the old judgment. If under these circumstances proof were made in bankruptcy on the bond for past breaches, persons suffering from future breaches would be without remedy.

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In *Greenville & Columbia Railroad* v. *Maffett*, 8 S. C. 307, it was decided that in case of a common law bond conditioned for the faithful performance of his duties by the principal obligor there is no such difficulty.

Whether there is or is not a difficulty in case of a common law bond or of a probate bond where there have been breaches before the date of the petition in bankruptcy and may be breaches after it, need not be decided in the case at bar, for, as we have said, in the case at bar the administrator died before leave to put the bond in suit was granted, and therefore there could be no future breaches of the condition of the bond now before us.

Judgment reversed; judgment to be entered for the defendant Maguire.

J. H. Pearl, for the defendant Maguire.

F. H. Pearl, for the plaintiff.

COMMONWEALTH *vs.* PATRICK McDONALD.

Suffolk. January 17, 1905. — April 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Larceny. Embezzlement. Pleading, Criminal, Indictment, Variance. *Practice, Criminal*, Order for restoration of stolen property.

An indictment alleging that the defendant did feloniously "steal, take and carry away" money of a certain person to an amount named charges the crime of larceny with technical precision.

Since the enactment of St. 1899, c. 316, (R. L. c. 208, § 26,) in charging the crime of larceny committed by embezzlement it has been unnecessary to state the fiduciary relation existing between the defendant and the person entitled to the property embezzled, or to allege that the defendant to whom it had been intrusted converted it to his own use. See St. 1899, c. 409, § 12, (R. L. c. 218, § 88.)

In an indictment for larceny by embezzlement an allegation that the money embezzled belonged to a person named is supported by proof that the person named was the master of a fishing vessel, of which the defendant was purser for the crew, and as master had a special property in the money within the meaning of R. L. c. 219, § 9, being accountable for it to the owner of the vessel and the crew.

Where, after a defendant has been found guilty of larceny of money and sentence has been imposed, the judge makes an order that the money in the possession

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of the defendant at the time of his arrest be restored to the owner as required by R. L. c. 208, § 39, the finding of the judge on the question of fact whether the money was a part of that wrongfully taken by the defendant is conclusive.

INDICTMENT, found and returned in the county of Suffolk on December 12, 1903, alleging that the defendant on November 2, 1903, at Boston, "money of the amount and of the value in all of seven hundred and seventy-seven dollars, a more particular description of which is to said jurors unknown, of the property, goods and chattels of one John Hamilton in his possession then and there being, did then and there feloniously steal, take and carry away."

At the trial in the Superior Court before *Aiken*, J., the defendant filed a motion to quash the indictment, and also a motion that the Commonwealth be required to furnish the defendant with a statement of particulars with reference to the force used in obtaining the property alleged to have been stolen, especially with reference to the exact person from whom the property was stolen and the exact time it was stolen. The motion to quash was denied by the judge, and the motion for a statement of particulars was not pressed by the defendant, an agreed statement of facts being substituted.

It appeared from the evidence that the defendant was employed on the fishing schooner Monitor, sailing from Boston and Gloucester, which brought a fare of fish to Boston on November 2, 1903; that the defendant was the cook or steward of the vessel; that John Hamilton was the captain; that when the vessel arrived the fare of fish was sold to various dealers; that it was the duty of the captain to collect the money due for the fish from the dealers and divide the proceeds, giving the owner one quarter and the crew three quarters after the expenses were deducted. Hamilton was to collect the money and account for it as above. The crew had the right to appoint a person to act as purser, whose duty it was to go with the captain to see what amounts were paid to him, so that the crew could know what amount actually was received. The defendant was chosen as such purser. Hamilton, the captain, testified that he and the defendant went to twenty-five or thirty places in Boston and collected what was due either in cash or checks, that Hamilton gave the checks to the defendant to keep for him until the next morning

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when the defendant was to return the checks to him either in Boston or in Gloucester. The next morning the defendant cashed the checks and appropriated the proceeds to his own use. It was agreed that none of the money thus received by the defendant ever was returned to the captain or the owner of the vessel.

The jury returned a verdict of guilty, and the defendant was sentenced to confinement in the house of correction for the term of one year. A motion to stay the execution of the sentence was denied, and the judge ordered that the property stolen by the defendant be restored to the owner. The defendant appealed from this order. Later he alleged exceptions which were allowed by the judge.

P. J. Casey, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

BRALEY, J. The motion to quash was overruled properly, as the indictment on its face sufficiently set forth with technical precision enough to charge the defendant with the crime of larceny. *Commonwealth* v. *Adams*, 7 Gray, 43. *Green* v. *Commonwealth*, 111 Mass. 417.

Under the agreed statement of facts, when supplemented by the defendant's evidence, it clearly appears that the money collected by him, either as cash from customers, or as returns of the checks which he negotiated, should have been delivered to the captain of the vessel, by whom alone after certain deductions had been made for expenses of the voyage, and necessary disbursements, it was to be divided in the proportion of one fourth to the owner of the vessel, and the remaining three fourths among the crew, which included the defendant.

Upon being selected by the crew, the defendant, as purser, accompanied the captain for the purpose of verifying the amounts received from the various persons to whom fish had been sold. The information thus obtained he was to communicate to them so that they would be fully informed of the financial result of the voyage, and thus be able to determine the share justly due each on its settlement.

In the performance of this service the defendant acted not as a part owner collecting money coming from the common venture, but as an agent for a special purpose.

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When the checks were committed to him, either for custody or collection, and he was authorized to receive the money due from customers whose places of business were on the wharf, he became bound by the understanding between them to deliver to the captain on the following morning the checks, or their proceeds, and money he had collected.

This brings us to the principal ground of defence, that because the defendant lawfully obtained possession of the property, he was guilty of the crime of embezzlement, and not of larceny, and the variance between the allegations of the indictment and the evidence was fatal.

The distinction between larceny at common law and the offence of embezzlement has been fully pointed out, and no further exposition is required in this case. *Commonwealth* v. *James*, 1 Pick. 375, 382. *Commonwealth* v. *Ryan*, 155 Mass. 523, 527. *Commonwealth* v. *Rubin*, 165 Mass. 453, 454. *Commonwealth* v. *Parker*, 165 Mass. 526, 539.

It also is plain that under the law as it stood before the St. of 1899, c. 316, now R. L. c. 208, § 26, upon the evidence the defendant was entitled to an acquittal. *Commonwealth* v. *King*, 9 Cush. 284. *Commonwealth* v. *O'Malley*, 97 Mass. 584. *Commonwealth* v. *Berry*, 99 Mass. 428. *Commonwealth* v. *Hussey*, 111 Mass. 432. *Commonwealth* v. *Mead*, 106 Mass. 319. *Commonwealth* v. *Flynn*, 167 Mass. 460.

But since this enactment it has been unnecessary to state the fiduciary relation existing between a defendant and the person entitled to the property embezzled, or to allege that the defendant to whom it had been intrusted converted it to his own use, for the crime of larceny under this statute includes the criminal appropriation of personal property where no trespass, or fraud which has been held equivalent to trespass, in obtaining its possession appears.

By the St. of 1899, c. 409, § 12, now R. L. c. 218, § 38, it is enough for appropriately charging the offence to aver directly that the person accused did steal, without making the usual descriptive averments of asportation, or means used to obtain possession of the property. *Commonwealth* v. *Kelley*, 184 Mass. 320, 323.

But as evidence of embezzlement is now sufficient to support a

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charge for larceny, an indictment which correctly sets forth the latter crime in the customary language of criminal pleading is ample to sustain a conviction thus obtained.

If the defendant desired further information to enable him to meet a more definite claim by the government than was shown by its formal allegations, or more fully to make his defence, it was open to him as of right to ask for specifications setting forth such additional facts. R. L. c. 218, § 39.

This statutory provision fully preserved his constitutional rights, and afforded him ample protection from being misled, or rendered unable to meet the real accusation made against him. *Commonwealth* v. *Kelley*, *ubi supra*. See *Commonwealth* v. *Dill*, 160 Mass. 536, 537; *Commonwealth* v. *Robertson*, 162 Mass. 90, 96.

But after filing a motion for a bill of particulars, the request was not urged, and he evidently was content to meet the issue as formally charged.

Another exception relates to the allegation of ownership, but this was amply sustained by the evidence, for Hamilton, being the master, and accountable to the owner of the vessel and the crew, had a special property in the money received within the provisions of R. L. c. 219, § 9. *Commonwealth* v. *Blanchette*, 157 Mass. 486, 489.

We find no error of law in the instructions given to the jury, and the rulings requested were refused rightly for reasons already stated. After judgment had been entered on the verdict and sentence imposed, an order was passed, from which the defendant appealed, directing that the money in his possession at the time of the arrest be restored to the owner as provided in R. L. c. 208, § 39.

In proceedings under the statute for such restoration it became a question of fact whether this money was a part of the amount wrongfully taken by him, and as there was evidence from which this could be found, the finding of the judge is conclusive, and not subject to review. *Commonwealth* v. *Boudrie*, 4 Gray, 418. *Schendel* v. *Stevenson*, 153 Mass. 351, 354.

Exceptions overruled; order affirmed.

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JOHN MEAGHER *vs.* CRAWFORD LAUNDRY MACHINERY COMPANY.

Suffolk. January 18, 1905. — April 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

If workmen are moving a heavy and long bar of iron over a rough uneven floor and are using for this purpose too small a truck which has wheels only at one end while in the building are four-wheeled trucks belonging to their employer suitable for moving such bars, and if after the truck has stuck so that the workmen cannot move it they are met by a superintendent who proceeds to take charge of moving the bar using the insufficient appliance adopted by the men instead of sending for a four-wheeled truck, and if the superintendent taking a piece of board as a lever tries to lift one of the wheels of the truck out of a depression in the floor and in so doing causes the truck to lurch and the bar to fall in such a way that one of the handles of the truck flies around and strikes and injures one of the workmen, the injured workman can recover from his employer for the injuries thus caused if the jury find that the superintendent was negligent and that the injured workman was in the exercise of due care.

A workman by his contract of employment does not assume the risk of accidents caused by the negligence of the superintendent under whom he is working.

TORT under St. 1887, c. 270, § 1, cl. 1, 2, (R. L. c. 106, § 71, cl. 1, 2,) for injuries sustained on August 31, 1900, while in the employ of the defendant, the declaration being described in the second paragraph of the opinion. Writ dated October 9, 1900.

At the trial in the Superior Court before *Fox*, J. the jury returned a verdict for the plaintiff in the sum of $600; and the defendant alleged exceptions, raising the questions stated by the court.

S. R. Jones, for the defendant.

W. M. Noble, for the plaintiff.

BRALEY, J. This is an action of tort to recover for personal injuries received while in the employ of the defendant by reason of a bar of iron slipping off a truck on which it was being moved thereby causing the handle of the truck suddenly to fly around and strike the plaintiff.

The declaration contained three counts. The first and second alleged that the plaintiff was injured either by a defect in the

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truck due to the negligence of the defendant, or the negligence of a person intrusted by it with superintendence over the moving of the bar, while the third charged the cause of the accident to be negligence of a person intrusted with and exercising superintendence, or whose sole and principal duty was that of superintendence. Under the rulings given at the trial the counts for a defective truck need not be considered, as the case was submitted to the jury on the third count, who returned a verdict in favor of the plaintiff.

The defendant's exceptions as presented at the argument are really two, and we consider them in the order of their presentation.

It had become necessary to move a large iron tool called a "boring bar" which was some eight or ten feet long by ten inches in diameter, and used by the defendant in its business, from the premises of a tenant on the same floor of the building to those of the defendant, where it was to be used. For this purpose a truck four feet or more in length, with two wheels in front, and having legs like an ordinary shipping truck behind, was used as a means of conveyance. After the bar was loaded by the plaintiff and two of his fellow workmen, under instructions from one Holmes, another employee, and while in transit, but before reaching that part of the building occupied by the defendant, the truck sank into the floor, which was rough and uneven, and they were unable to move it further. As they were endeavoring to start the truck, one Burgquist, the superintendent of the defendant, appeared, and it could have been found, although the witnesses differed as to the form of expression, that he inquired of Holmes, whom he had ordered to do the work and who up to this time had directed the moving of the bar, "What are you taking that for? . . . That is not what is wanted at all, but as long as you have got it on the truck, take it along now." An attempt had been made previously to move the truck by attaching a rope to the axle, and a further effort having failed the superintendent then took charge, after which it was moved forward about fifteen feet, when it again stuck. There was evidence from which it could have been found, although denied by him, that the superintendent then took a piece of board and, using it as a lever, endeavored to lift one of the

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wheels out of the depression, and that his action caused the truck to lurch and the bar to fall. While passing from the truck to the floor the bar struck and turned the handle, causing the plaintiff's injuries.

Nor is it any the less an act of superintendence on his part that he continued to use the means employed by the men who were then engaged in carrying out his original order than if from the beginning he had supervised the operation, as he had full authority to go on with the work, or get a suitable truck, or employ some other adequate way to move the bar.

To move a heavy and long bar of iron of the kind described over a rough, uneven floor, so placed that by reason of the size of the truck it was insecure, and, if the truck were raised sufficiently to enable it to pass, there was a probability that the bar might roll off and come into contact with the men who were moving it, might be found to be improper and unsafe.

The superintendent, who was a witness at the trial, admitted that a truck with four wheels would have been better than the one which was being used; and it appeared that such trucks were furnished by the defendant and could have been used. He further testified that he considered the one used suitable for this purpose, but the jury were not required to accept his judgment. They could have found on all the evidence that a truck insufficient in size had been originally selected for the work, whereas, if a stronger and larger one had been taken, the bar would have rested securely while being moved; and that after the superintendent saw this method of transportation, instead of adopting some other and safer way he continued the work under the same faulty conditions.

It is strongly urged by the defendant that the act of the superintendent in raising the wheel was one of manual labor and not of superintendence, and, as it contributed to the injury, there can be no recovery.

But at the time he was actively engaged in fowarding the work, and the plaintiff and his fellow servants were under his immediate supervision. He was not engaged in working with the men in a common task of manual labor. When he had decided to make no change, but to proceed, his use of the lever was not an independent act of work with his hands, but a part

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of the plan, or one of the conditions connected with his superintendence, and the moment of time taken for its performance cannot be singled out for the purpose of saying that he was at that instant a common laborer, although immediately before and after he was clothed with the authority of his superior position. *O'Brien* v. *Look*, 171 Mass. 36, 41. *Joseph* v. *George C. Whitney Co.* 177 Mass. 176, 177. *Roche* v. *Lowell Bleachery*, 181 Mass. 480, 482.

It must therefore be held that the ruling requested "That there is no evidence to go to the jury that the accident was caused by an act of superintendence" could not have been granted, and the ruling given that the question whether the accident was caused by reason of the negligence of a person in the exercise of superintendence was properly left to the jury to determine.

Neither can it be said that the plaintiff assumed the risk of the negligence of the superintendent, or as matter of law was not in the exercise of due care. Upon the superintendent taking control the plaintiff well might rely on his personal supervision as an assurance that the way in which the bar was being moved was reasonably safe, although he could not for this reason disregard obvious dangers, or unsafe conditions with which he was acquainted.

But there is nothing in the evidence to show that the plaintiff from his previous knowledge or experience knew, or had reason to apprehend, that the bar was insecurely placed, and if it fell might cause the handle of the truck to strike him, and the question of his due care was rightly submitted to the jury. *Meehan* v. *Holyoke Street Railway*, 186 Mass. 511.

The further argument of the defendant that the plaintiff as incidental to his employment assumed the risk of injury from the superintendent's negligence is untenable. If this were so, the superintendent would be a fellow servant as at common law, and one of the principal objects of the St. of 1887, c. 270, § 1, cl. 2, abolishing this defence in actions under the act would be defeated. *Mahoney* v. *Bay State Pink Granite Co.* 184 Mass. 287, 290. *Murphy* v. *New York, New Haven, & Hartford Railroad*, *ante*, 18, 20, 21. *Rapson* v. *Leighton*, *ante*, 432.

Exceptions overruled.

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IDA I. BROUGH *vs.* AMOS TOWLE & another.

Suffolk. January 27, 1905. — April 3, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Master and Servant.

In an action against the members of a firm engaged in a general teaming business for injuries received from being struck by a team of the defendants when the driver was intoxicated and driving negligently, if it appears that when the plaintiff was struck the team was going toward the defendants' stables at about eleven o'clock in the morning, that it was the practice of the defendants not to have their teams return to the stables in the middle of the day and to have the horses fed from pails at their stand, but that the driver of this team had done all the work assigned to him on that day, that an unusually heavy rain was falling, and that on a few occasions in extreme weather the defendants' teams had been sent to the stables, it can be found that the driver was acting within the scope of his employment at the time of the plaintiff's injury.

TORT for injuries from being struck by one of the teams of the defendants through the alleged negligence of the driver. Writ dated December 20, 1901.

At the trial in the Superior Court before *Stevens*, J. it appeared that the defendants were engaged in the business of general teaming and expressing, having an office in Boston proper and their stables on Miller Street in that part of Boston called Charlestown, and that the accident happened in the manner described in the opinion. The jury returned a verdict for the plaintiff in the sum of $1,500; and the defendants alleged exceptions, raising in argument the single question stated by the court.

The case was argued at the bar in January, 1905, before *Knowlton*, C. J., *Morton*, *Loring*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

W. I. Badger & *W. H. Hitchcock*, for the defendants.

J. J. Irwin, for the plaintiff.

KNOWLTON, C. J. The only question argued by the defendants' counsel on this bill of exceptions, is whether there was any evidence to warrant the jury in finding that, at the time of the injury to the plaintiff, the defendants' driver was acting

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within the scope of his employment. He was a teamster, who had been sent that morning by one of the defendants to an oil store on Purchase Street in Boston, to take a load of oil to the Baltimore boat at Battery Wharf. At about eleven o'clock on the same day, he was seen driving through City Square in Charlestown, towards the defendants' stables where the team was kept. He was driving negligently, and apparently was in a state of intoxication. The plaintiff was struck by the team and injured. These stables were the only place where the defendants put up their horses; but one of the defendants testified that it was their practice to feed their horses in the middle of the day, by means of pails, in Boston. No other work had been assigned to the driver that day, but one of the defendants testified that he was told to come back to the stand in Boston after finishing his work with the oil. Light rain began early in the morning, but soon after eight o'clock it became very heavy. An inch and eighty-seven one hundredths of rain fell between eight o'clock in the morning and eight o'clock in the evening.

The teamster had for the time the custody of the team, and the jury well might believe that he was given considerable discretion in the care of it, under unusual conditions. The defendants' testimony tended to show that, on a few occasions, in extreme weather, the teams had been sent to the stables; and it is a very natural inference that, as the usual time for feeding the horses was drawing near, and as no particular work had been assigned him, the driver, in the interest of his employer, undertook to take the horses across the bridge to the stables in Charlestown, rather than to attempt to feed them from pails in Boston, in a rain which had become so heavy that horses could not stand out in it without great discomfort. It is not expressly stated that all the material evidence is reported in the bill of exceptions; but if we assume that nothing else appeared, we think that the circumstances warranted a finding that the driver was attempting to take the team to the stables for his employers. No other possible reason is shown for his driving directly towards the stables, in close proximity to them at that time.

The jury might have disbelieved the testimony of one of the

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defendants, that he told the teamster to return to the stand after taking the oil to the boat, and, from other things in his statements and manner, they might have drawn an inference that the drivers were given much greater authority in regard to the management and care of their teams than he represented.

We are of opinion that the evidence was rightly submitted to the jury.

Exceptions overruled.

CITY OF LAWRENCE *vs.* INHABITANTS OF METHUEN.

Essex. November 2, 1904. — April 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Evidence, Opinion: experts. *Witness. Pauper. Words*, "Shall."

Upon the question of the reasonableness of a charge for medical attendance upon a smallpox patient at the attending physician's house in a city, it is within the discretion of the presiding judge to find disqualified as an expert one who has been an overseer of the poor and a member of the board of health of an adjoining town and who has on several occasions employed several physicians in the treatment and care of smallpox patients.

The provision of St. 1898, c. 425, § 2, (R. L. c. 80, § 6,) that "All persons absent from the Commonwealth of Massachusetts for ten years in succession shall lose their settlement" is not retroactive.

CONTRACT by the city of Lawrence against the town of Methuen for $1,200 paid for medical attendance, medicine and food and the board of a cook and nurse furnished for Frank H. Brown, afflicted with smallpox for twenty-four days in February, 1900, in the city of Lawrence and alleged to have a settlement in Methuen. Writ dated January 20, 1902.

In the Superior Court the case was tried before *Holmes*, J. George O. Marsh, called as an expert witness for the defendant, testified that for the past sixteen years he had been an overseer of the poor and a member of the board of health of the town of Methuen, which adjoins Lawrence, and that during most of that time he had had charge of the poor department, and had the care of a number of smallpox patients, and that he had on several

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occasions employed several physicians in the treatment and care of smallpox patients; that he was familiar with the prices charged by such physicians, that he knew what had been paid in several cases for the board and nursing of such patients and for medicines for them, and that he was familiar with the charges for all such services. He was asked, "What would you consider, from your experience with smallpox patients, would be a reasonable compensation for maintaining a patient afflicted with smallpox in the house of Dr. O'Connor for the space of twenty-four days in February, 1900?" The judge excluded the question on the ground that the witness was not qualified as an expert. The defendant excepted, and offered to show that the price of $40 a day named by Dr. Magee, an expert who had testified for the plaintiff, was excessive, and that the ordinary compensation for the board and nursing, medicines and medical attendance and all expenses involved in the care of smallpox patients was much less than $40 a day.

The judge reported his findings as follows:

"I find that Isaac A. Brown, the father of Frank H. Brown, had a settlement in the town of Methuen; that he left Methuen in 1864, went to Vermont and enlisted as a soldier in the Civil War and served in the quota of Vermont, and lived in that State until 1877, when he went to California and died there in 1895; that Frank H. Brown, his son, was born in Vermont on May 19, 1875, and came to Lawrence in 1891, but never himself acquired a settlement in Massachusetts. I am of opinion that Frank H. Brown derived a settlement through his father in the town of Methuen, and that although the father was never in the Commonwealth after 1864, yet the Act of 1898, c. 425, § 2, (R. L. c. 80, § 6,) is to be construed prospectively and does not affect his settlement. I therefore find that Frank H. Brown had his settlement in Methuen at the time of his smallpox sickness.

"I find that Frank H. Brown was infected with smallpox at Lawrence on February 1, 1900; that he was then at the home of Dr. O'Connor and could not be removed therefrom without danger to his health, and that he there was treated for his sickness by the board of health. If any notice was required I find that notice was given in writing that Brown was being treated

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for smallpox and claim for reimbursement made therefor by the board of health of Lawrence, on the board of health and selectmen and overseers of the poor of Methuen, March 15, 1900, who replied March 23, 1900, denying his settlement; that the city of Lawrence paid for the expenses of treating Brown $1,200, which was paid to Dr. O'Connor and was for Dr. O'Connor's services as physician, and for the medicine and food of Brown and for the board of a cook and nurse attending him during his smallpox illness. I find that this expense was reasonable, and I find that neither Frank H. Brown nor his mother was able to pay such expense, and that he had no master."

The judge found for the plaintiff in the sum of $1,245.60, and refused to make certain rulings requested by the defendant. Among the rulings thus requested and refused were the following:

"1. Upon all the evidence the plaintiff cannot recover."

"3. The absence of Isaac Brown from this Commonwealth for ten consecutive years caused him to lose his settlement in Methuen, if he ever had one.

"4. The absence of Frank H. Brown from this Commonwealth for ten consecutive years caused him to lose his settlement in Methuen, if he ever had one."

The case was argued at the bar in November, 1904, before *Knowlton*, C. J., *Lathrop*, *Barker*, *Hammond*, & *Loring*, JJ., and afterwards was submitted on briefs to all the justices.

W. Coulson, (*W. S. Knox* with him,) for the defendant.

J. P. Kane, for the plaintiff.

LORING, J. 1. The exception is not well taken to the finding that Marsh was not qualified as an expert.

What distinguishes the case at bar from *Kendall* v. *May*, 10 Allen, 59, is that no professional services were rendered in that case, while here the question called for an opinion on the amount reasonably due as compensation for the professional services of Dr. O'Connor. We do not go so far as to say that one who is not a doctor could not qualify as an expert on the question of the reasonableness of the fees charged by a physician for medical services, yet the practical result which would follow if every one who had hired physicians or knew of the amount charged by them could be called as an expert on the question is a matter to be considered.

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In the case at bar we cannot say that on the evidence before him the presiding judge did not find that Marsh's experience was confined to the fees charged by two or three physicians, on two or three occasions, in the treatment of smallpox cases which may have been quite unlike the case of smallpox in the action now before us, in a small town like Methuen, and consequently that he was not qualified to give an opinion on the reasonableness of the fee charged in this case by a physician in a city like the city of Lawrence. See *Muskeget Island Club* v. *Nantucket*, 185 Mass. 303; *Phillips* v. *Marblehead*, 148 Mass. 326.

2. We are of opinion that the last clause of St. 1898, c. 425, § 2, now R. L. c. 80, § 6, is not to be construed to be retroactive.

The defendant contends that the word "shall" in the clause in question is not indicative of the future but of the imperative character of the provision in question; that it is not expressive of time but is used to declare that the provision is a mandatory enactment; and that the person who drafted the clause in question had his mind fixed on past settlements, as is shown by the previous clause of this section.

The section repealed by St. 1898, c. 425, § 2, was a section which made void all settlements acquired by any provision of law in force prior to February 11, 1794; and the first clause of St. 1898, c. 425, § 2, makes void all settlements not fully acquired after May 1, 1860.

It is however to be observed that the clause in question is altogether a new provision. There is no counterpart to it in the section repealed by the section in question. Also that the Legislature did not enact in terms that all persons absent from the Commonwealth for ten consecutive years shall be regarded as having lost their settlements, as the defendant asks us to hold was enacted by this section. What the Legislature did provide was that "all persons absent from the Commonwealth of Massachusetts for ten years in succession shall lose their settlement," in the words of the original act. St. 1898, c. 425, § 2. The use of the word "shall" in the clause in question is in contrast with the words "are hereby defeated and declared to be lost," found in the earlier clause of the section which deals with past settlements. In other words, so far as language goes, the two clauses are not similar but are in contrast with each other.

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We see nothing here to take this section out of the general rule that even in a pauper settlement act the word "shall" *prima facie* refers to the future. *Worcester* v. *Barre*, 138 Mass. 101.

Exceptions overruled.

CHARLES H. COX *vs.* CENTRAL VERMONT RAILROAD COMPANY & trustee.

FRANCIS A. AMBLER *vs.* SAME.

W. F. BURDITT & another *vs.* SAME.

E. C. DENNIS *vs.* SAME.

ROBERT T. PRENTISS *vs.* SAME.

DAVID WHITING & others *vs.* SAME.

C. B. EDGERLY *vs.* SAME.

E. C. CROSBY & another *vs.* SAME.

HOWARD B. CHASE *vs.* SAME.

W. B. JOHNSON *vs.* SAME.

SAMUEL P. TRAIN *vs.* SAME.

Suffolk. November 14, 15, 1904. — April 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

Trustee Process. Railroad.

Statements made upon information and belief in the answer of one summoned as trustee by trustee process in the absence of anything in the record to control them must be taken as true.

In an action against a railroad company another railroad company cannot be charged by trustee process for money credited to the defendant on account of the earnings of railroads beyond the defendant's lines which the defendant would take only as the agent and trustee of the companies operating those railroads.

In an action against a railroad company another railroad company can be charged by trustee process for money due to the defendant on account of the earnings of a railroad leased to the defendant by an instrument under which the defendant is to conduct the business of the leased road as a proprietor and not as a trustee, its possession and control being that of a lessee bound by the covenants of the instrument.

In an action against a railroad company another railroad company cannot be

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charged by trustee process for cars in its possession mortgaged by their owner and lessor to which the defendant's only title is that of a lessee for ninety-nine years under an instrument containing among other covenants one to keep the cars in good condition and to replace them with other like property when worn out, and a covenant giving the lessor the right at any time, after a short notice, to enter and take possession of the property and terminate the lease in case of a breach of covenant by the lessee.

Sections 3300, 3353 and 3443 of R. L. of Vermont, 1880, give no right to attach by trustee process or otherwise rolling stock leased to a defendant railroad company but which it never has owned.

R. L. c. 167, § 39, providing that railroad cars and engines in use and making regular passages on railroads shall not be attached upon mesne process within forty eight hours previous to their fixed time of departure unless the officer first demands other property upon which to make the attachment, applies to an attachment of cars and engines by trustee process.

In an action against a railroad company another railroad company cannot be charged by trustee process for a freight car in its possession on a side track in another State.

ELEVEN ACTIONS OF CONTRACT, numbered on the docket of the Superior Court for the county of Suffolk from 62 to 72 inclusive, against the Central Vermont Railroad Company in which the Boston and Maine Railroad was summoned as trustee. Writs dated December 8, 1890.

The liability of the defendant in these actions was determined at a previous stage of the cases, as reported in 170 Mass. 129.

On June 21, 1898, the Superior Court upon a motion of the plaintiffs that the alleged trustee be charged upon its answers made the following order:

"As it appears by its answers to the plaintiffs' interrogatories — Answer to Int. 3, filed May 29, 1897 — that there were some goods, effects or credits to wit: certain credits and money of the defendant in the hands and possession of the alleged trustee at the time of the service of the writ upon it — for which it is liable as such trustee. It is *ordered* that the said Boston and Maine Railroad be and stand charged as trustee — without determining whether there was any valid or such attachment of any cars of the defendant then in its hands or possession, for which it is, or may also be liable to be charged."

On April 29, 1903, the plaintiffs moved that an order of notice be issued to the Grand Trunk Railway Company, a corporation established under the laws of the Dominion of Canada, ordering it to appear for the purpose of determining its title, if any, to the funds held by the trustee. This motion was opposed by the

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trustee, but the Superior Court ordered that the notice be given, and it was served upon the Grand Trunk Railway Company by leaving an attested copy with the commissioner of corporations of this Commonwealth as its agent. The Grand Trunk Railway Company did not comply with the notice and never appeared in the cases.

On August 12, 1903, in pursuance of a motion previously filed, the Boston and Maine Railroad summoned as trustee moved in the Superior Court before *Schofield*, J. that the trustee might be discharged or if chargeable that the extent to which it was chargeable might be ascertained. The judge made certain findings and rulings as stated below, and ordered that the trustee be charged in the sum of $12,840.89. Being of opinion that the questions involved in the cases ought to be determined by this court before any further proceedings were had in the Superior Court, with the consent of all the parties, he reported the cases for determination by this court. If the findings and rulings made by the judge were right, judgment was to be entered on the verdict in each case charging the trustee in accordance with the ruling and order made. If any finding or ruling made by the judge, to which exception was taken, was erroneous, such finding or ruling or any order based upon it was to be set aside and such judgment and order were to be entered as law and justice might require.

The report was as follows:

On November 20, 1894, the plaintiff in each action recovered a verdict against the defendant, and the exceptions taken at the trial were overruled on January 8, 1898. Nothing remains to be done before judgment except to determine whether and to what extent the trustee is chargeable.

The trustee was charged generally by an order made on June 21, 1898, [quoted above] upon its answers that then had been filed without determining any question as to the amount for which it was chargeable. Afterwards, on December 1, 1902, the trustee by consent of the plaintiffs was allowed to file an additional answer amending its former answers. On August 5, 1903, at a hearing before *Sheldon*, J., the trustee moved that the order of June 21, 1898, might be vacated. The motion was denied, and the trustee excepted.

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Upon the hearing of the motion made on August 12, 1903, which is mentioned above, the trustee requested the following rulings:

1. That the trustee is not chargeable for the $16,521.42 mentioned in its additional answer as due to the Grand Trunk and other railway companies the same never having been due to the defendant.

2. That the trustee is not chargeable for the $2,154.18 mentioned in the same answer as arising from business on the Ogdensburg and Lake Champlain Railroad, the same being subject to a trust under the lease of that railroad, and the defendant having no beneficial interest in this money.

3. That the trustee is not chargeable for the $10,686.71 mentioned in the same answer as arising from business on the Consolidated Railroad, the same being subject to a trust under the lease of that railroad and the defendant having no beneficial interest in this money.

4. That the trustee is not chargeable for the twenty-seven freight cars mentioned in the same answer as belonging, two to the Burlington and Lamoille Valley Railroad Company and twenty-five to the Ogdensburg Car Company.

5. That the trustee is not chargeable for the cars comprised in the mortgage by the Consolidated Railroad Company to the American Loan and Trust Company, the interest of the defendant under the subsequent lease to it by the Consolidated Railroad Company having been extinguished by the foreclosure of the mortgage.

6. That the five cars purchased by the defendant out of the earnings of the leased railways as renewals of some of the other cars in pursuance of the lease as mentioned in the same answer were subject to the mortgage according to its provisions and by the law of Vermont mentioned in the answer.

7. That the trustee is not chargeable for any cars that were not in this State at the time of the attachment.

8. That the trustee is not chargeable for any cars that are not ascertained to have been in this State at the time of the attachment.

9. That the trustee is not chargeable for any cars that were making regular passages in trains or about to depart on a

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regular passage within forty-eight hours at the time of the attachment.

10. That the trustee is not chargeable for the passenger car destroyed by fire in November, 1894.

11. That the trustee is not chargeable for any of the cars as it was bailee of the same for its own use for hire until it returned them to the defendant in Vermont in pursuance of the terms of the bailment.

12. That the trustee is entitled to be discharged notwithstanding the order of June 21, 1898, charging the trustee generally upon its answers then filed as its additional answer since filed and amending its former answers has removed from those answers the statements upon which that order was based.

13. That if the trustee is precluded by the order of June 21, 1898, from being discharged then the trustee ought to be charged only for a nominal sum.

14. That in the seven cases Nos. 62–68, if the trustee is chargeable for anything it should be charged subject to the rights of the plaintiffs in the other actions in which simultaneous attachments were made.

15. That in the four cases Nos. 69–72, if the trustee is chargeable for anything it should be charged subject to the rights of the plaintiffs in the other actions in which simultaneous attachments were made and also subject to the prior attachments made in the other actions.

The counsel for the plaintiffs requested the judge to rule that the trustee was chargeable for all the money standing to the credit of the defendant in the account mentioned in its answers and for all the cars mentioned in its answers as being in its possession and marked with the name of the defendant.

The judge made the following findings and rulings:

1. The court assumes that the facts stated in the answers of the trustee must be accepted as true, even when stated on information and belief. The additional answer admits that at the time of the service of the writs of trustee process upon the trustee it had in its hands and possession the sum of $29,362.31 standing upon its books to the credit of the defendant.

2. A part of the sum in the possession of the trustee, namely, $16,521.42, was payable to the defendant as the agent of the

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Grand Trunk Railway and other railroad companies on account of traffic over their respective lines. For this part of the money in its hands the trustee was not charged.

3. Another part, namely, $2,154.18, of the sum in the possession of the trustee, was payable to the defendant for business transacted upon the railroad of the Ogdensburg and Lake Champlain Railroad Company, of which the defendant held a lease, by assignment. This sum was alleged to be subject to a trust, but the facts were not set forth with sufficient fulness by the trustee to show that the money when paid to the defendant might not be held by it free from any trust and subject to attachment for its debts. For this sum of $2,154.18 the trustee was charged.

4. Another portion, namely, $10,686.71, of the sum in the possession of the trustee was payable to the defendant for business transacted upon the railroad of the Consolidated Railway Company of Vermont, of which the defendant was lessee. This sum also was alleged to be subject to a trust, but the facts were not set forth with sufficient fulness by the trustee to show that the money when paid to the defendant might not be held by it free from any trust and subject to attachment for its debts. For this sum of $10,686.71 the trustee was charged.

5. For the cars in the hands and possession of the trustee at the time of the service of the writs of trustee process upon it the trustee was not charged.

6. Upon the whole case the trustee was charged for the sum of $12,840.89.

7. In each of the cases numbered 62 to 68 inclusive the trustee was charged subject to the rights of the plaintiffs in the other actions in which simultaneous attachments were made, including the two actions removed to the Circuit Court of the United States and prosecuted by the plaintiffs Webster and Schultis. Each plaintiff was found to be entitled to one ninth part of the fund for which the trustee was charged. If the aliquot part to which any plaintiff was entitled was more than sufficient to pay the judgment in his favor, the surplus was to go to the other plaintiffs having attachments made at the same time.

8. In each of the cases numbered 69 to 72 inclusive the trustee was charged subject to the prior attachments made in the nine actions above mentioned, and also subject to the rights

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of the plaintiffs in the other actions in which simultaneous attachments were made, including the three actions removed to the Circuit Court of the United States and prosecuted by the plaintiffs Pope, Woodward, and Wade.

The ruling requested by the plaintiffs was refused, and the second and third rulings requested by the trustee were refused. The plaintiffs and the trustee respectively excepted to the refusal of these rulings, and each excepted to all of the rulings made in favor of the other.

The cases were argued at the bar in November, 1904, before *Knowlton*, C. J., *Morton*, *Lathrop*, *Barker*, & *Loring*, JJ., and afterwards were submitted on briefs to all the justices.

J. L. Thorndike, (*E. R. Thayer* with him,) for the Boston and Maine Railroad, trustee.

R. M. Morse, for the plaintiffs.

KNOWLTON, C. J. The question in these cases is whether the Boston and Maine Railroad, summoned as trustee, shall be charged upon its answers. The cases have been pending many years, and different answers have been filed at different times, and various proceedings have been had to determine the liability of the trustee. On December 1, 1902, an answer was filed in addition to and in amendment of the former answers, which purports to give with much fulness the facts in regard to the various questions now before us. We are of opinion that the previous proceedings do not affect the rights of the parties to rely upon this answer, in connection with the other answers, as stating facts upon which the cases should be decided.

Many of the statements are made upon information and belief. These statements, in the absence of anything in the record to control them, must be taken as true. *Willard* v. *Sturtevant*, 7 Pick. 194, 197. *Bostwick* v. *Bass*, 99 Mass. 469. *Clinton National Bank* v. *Bright*, 126 Mass. 535. *Emery* v. *Bidwell*, 140 Mass. 271, 274. *Seward* v. *Arms*, 145 Mass. 195.

It appears that the trustee had in its possession $16,521.42 which was due to the defendant on account of business done by other railroad companies whose railroads formed, with the railroads of the defendant and the trustee, continuous lines, of which only the railroad of the defendant joined that of the

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trustee. The total charge for all this business was collected either at the place of starting or at the place of destination, and was accounted for to the companies that were entitled to it. For the sake of convenience it was a custom of each company having money to pay to the others, to pay to the one whose railroad adjoined its own, not only the amount due that company, but also all sums belonging to the other companies beyond, and the company receiving the money retained what was due to it and forwarded the residue. Accounts were kept by each only with the companies owning the railroads next adjoining its railroad on each side of it, and the trustee kept an account only with the defendant, crediting to the defendant and paying it not only the sums due to it, but also the sums due on account of such business to the other companies, and no distinction was made in the accounts or items between money paid to the defendant as belonging to it and money paid to it belonging to the other companies. Under these facts, money credited to the defendant on account of the earnings of railroads beyond its lines it would take only as the agent and trustee of such railroads. This part of the case is covered by the decision in *Chapin* v. *Connecticut River Railroad*, 16 Gray, 69, which is shown by an examination of the papers on file to be identical with this case in its material facts. See also *Seward* v. *Arms*, 145 Mass. 195. For this money the trustee cannot be charged.

The answer shows that $2,154.18 was held by the trustee, which was due to the defendant on account of earnings from business done on the Ogdensburg and Lake Champlain Railroad. This road the defendant was operating under a lease with many special covenants, given by that corporation to the Consolidated Railroad Company of Vermont, and assigned by a formal assignment and by another elaborate instrument of transfer to the defendant. Under the original lease all of the gross receipts from the business and traffic of the railroad and other property were to be received by the lessee, and were to be disposed of by it in the manner stated. The lessee then covenanted to keep and maintain the railroad and its equipments and all property pertaining to it in good order and condition, making renewals of cars and engines and other things needed; to pay all taxes and assessments upon the property, and to pay expenses of meet-

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ings of directors and stockholders of the lessor, to assume and pay the expenses of pending litigation, to fulfil outstanding contracts and obligations of the lessor, to assume all obligations of the lessor that might afterward be incurred by statute or at common law as common carrier, warehouseman or otherwise, and indemnify and save harmless the lessor from all costs, damages or loss by reason of any failure to fulfil these obligations, and by reason of any claim that might arise from the maintenance and operation of the railroad and other property, to keep policies of insurance in force for the benefit of the lessor upon the buildings, bridges and docks of the lessor and other property then kept insured by it, and, in the discretion of the lessee, to keep in force such policies of insurance as it might deem advisable to protect it from loss by virtue of its liability as a common carrier. The lessee was also to keep accurate accounts of its earnings and income from the railroad and other property, and of its expenses and disbursements concerning the same, open to the inspection of the lessor, and was to furnish the directors of the lessor whenever called upon with accurate accounts and statements of the receipts and disbursements concerning the railroad and other property, to the end that the directors might, from time to time, determine the amount of net earnings applicable to the payment of interest on certain bonds outstanding against the lessor.

The lessee then covenanted with the lessor that the gross earnings, income and receipts from the business of the railroad and other property, should be disposed of, first, for the payment of the obligations hereinbefore mentioned, and the other expenses of the maintenance, operation, use, development and improvement of the railroad and other property, and the payment of certain floating indebtedness specified in a schedule, second for the payment of interest on certain first mortgage bonds outstanding against the lessor, and afterwards to the payment of interest on certain other bonds of different classes, and then that the residue and remainder should be divided equally between the parties.

The contention of the trustee is that all the gross earnings of this railroad which the defendant collected in its management of the property, it received and held as a trustee, and that the

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money in its hands was not subject to attachment for its debts or liabilities incurred in the business or otherwise. We are of opinion that this contention is not correct. The defendant was in the possession and control of the railroad. It was bound to the lessor by a variety of covenants which created a direct liability at law. It was its duty, as the lessee in possession of the railroad, to conduct the business, and in so doing to contract debts from day to day in the operation of the railroad, as if it were the owner. It was its duty to pay these debts, and the payments were to be deducted from the gross earnings to determine the net earnings in which the lessor had an interest. Upon the theory of the trustee in this case the defendant was acting as a trustee in the possession and operation of the railroad, and in the collection of every bill for the transportation of merchandise, and in incurring every debt that it contracted in the course of the business. Upon this theory, every one who had a valid claim, small or great, whether in contract or in tort, growing out of its possession and operation of the railroad, was a *cestui que trust* under the instrument, and could bring a suit in equity to have the trust enforced against the gross earnings for his benefit. We do not think that this is the true construction of the instrument. We are of opinion that the debts contracted in operating the railroad were primarily the lessee's debts, and that the lessee was expected to collect the earnings as primarily its own moneys, keeping accurate accounts of what it received and paid out. Much of the indebtedness contracted, which the defendant had a right to pay, depended to a large extent upon the exercise of its discretion. It hardly could have been intended that there should be a specific trust affecting the gross earnings in reference to the payment of every item of the operating expenses. The general provisions of the instrument indicate that the lessee was to conduct the business as a proprietor and not as a trustee, and that its possession and control should be that of a lessee bound by the covenants of the instrument.

If at any time the lessee should be guilty of such a breach of its contract as would put in peril the rights of the lessor, probably the lessor would have a remedy in equity for the protection of its interests. But in reference to such a condition

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there is a provision for a re-entry and termination of the lease by the lessor, similar to that contained in common leases. We are of opinion that so long as the defendant was left in possession and control of the property and assets, it could receive the gross income as its own money and use it for the payment of its own debts, holding itself accountable to make payments under its covenants. The cases of *Grand Trunk Railway* v. *Central Vermont Railroad*, 78 Fed. Rep. 690, *Grand Trunk Railway* v. *Central Vermont Railroad*, 81 Fed. Rep. 60, and *Welden National Bank* v. *Smith*, 86 Fed. Rep. 398, all of which relate to this instrument, do not seem to us inconsistent with this view. Of course after the property came into the hands of a receiver appointed by a court of equity, the court would marshal and appropriate income which accrued to the receiver, according to the requirements of the contract under which he held. We are of opinion that the trustee is chargeable with this sum, as money subject to attachment for the defendant's debts.

The sum of $10,686.71, due to the defendant on account of earnings of the Consolidated Railroad Company of Vermont, stands in much the same way. The defendant had a lease of this railroad and the property pertaining to it for ninety-nine years. Its provisions, differing somewhat in details, are very similar to those of the lease which we have just been considering. It contains a provision for an entry and a termination of the lease in case of breach of covenant continued for three months after a notice in writing from the lessor. We are of opinion, for reasons just stated, that the money received for gross earnings of the railroad, so long as the lessee was in undisturbed possession in the performance of its covenants under the lease, was to be taken and held as its own money and accounted for to the lessor. We are of opinion that the trustee is chargeable for this sum also.

The remaining question is whether the trustee is chargeable on account of the cars of the defendant which it had in its possession. Of these, two, which were marked with the defendant's name, belonged to the Burlington and Lamoille Valley Railroad Company, and twenty-five others so marked belonged to the Ogdensburg Car Company. The plaintiffs do not contend that the trustee should be charged for these cars. One

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hundred and seventeen of the other freight cars and three passenger cars and two baggage cars were a part of the property leased to the defendant by the Consolidated Railroad Company of Vermont with its railroad, on June 30, 1884, by an instrument already referred to. They were also covered by a prior mortgage made by the last mentioned corporation and the Vermont and Canada Railway Company to the American Loan and Trust Company, which included their respective railroads, to secure the payment of certain bonds, which mortgage was then in full force, although it has since been foreclosed by a sale of the property. The only title of the defendant was, therefore, that of a lessee for ninety-nine years under an instrument containing many covenants, among which was a covenant to keep this property in good condition and replace it with other like property when worn out, and a covenant giving the lessor a right at any time, after a short notice, to enter and take possession and terminate the lease for a breach of covenants. Such a title is not an ownership which subjects the property to attachment, in the absence of statutory provisions giving a right of attachment.

In Vermont there are statutes, relating to furniture, cars and engines of railroad companies, which indicate a general purpose of the Legislature to subject them to attachment for debts and liabilities incurred in the management and operation of the railroad. R. L. of Vermont, 1880, §§ 3300, 3353 and 3443. The second of these sections makes all such property a part of the realty which passes under a mortgage when such a conveyance of a railroad is made. But it leaves it liable to attachment and execution against the mortgagor on a claim for an injury sustained on the railroad by negligence of the corporation, or for services rendered, or materials furnished to keep the road in repair, or to operate the same, or for liabilities as a common carrier. This section gives no right to attach such property of a railroad corporation upon a claim against a lessee of the railroad.

Section 3443 is broader, giving a right to attach cars, engines and other property used in the operation and management of a railroad, upon a claim for an injury to person or property by the corporation operating the railroad, provided the property has at any time been owned by the corporation liable for the injury.

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This section would give a right to attach the cars in these actions, if the cars had at any time been owned by the defendant.

It is contended that the title of the defendant as lessee was an ownership within the meaning of this section. But we are of opinion that this title, which was subject to be terminated at any time on short notice for a breach of covenant, and which was subject to a prior mortgage that made the property a part of the realty held by the mortgagee, and was also subject to a covenant to keep it in good condition for the benefit of the lessor and to return it or other like property in its place at the termination of the lease, was not an ownership within the meaning of this section. It follows, therefore, that as to these cars the defendant had no such title, either at common law or under the statutes of Vermont, as was necessary to subject the property to attachment upon a claim against it.

There are five cars that stand a little differently. These were not acquired by the defendant under its lease, but were bought and put upon the railroad in performance of a covenant in the lease to keep the rolling stock in good condition and to replace it when worn out. Perhaps it might be held that these cars were owned by the defendant at the time of the attachment, or had been owned by it, and were within the terms of § 3443 above referred to. Assuming this in favor of the plaintiffs, there are other grounds on which the trustee is discharged from liability on account of them. The passenger car number 86 and mail car number 50 were making a regular passage on a train passing over the trustee's railroad to Boston, and were intended, after completing the passage, to depart again within forty-eight hours upon a regular return passage from Boston over the trustee's railroad and other railroads, to a railroad of the defendant, and did so depart and make such return passage. The baggage car number 22 was making a regular passage upon another train through New Hampshire under similar conditions. The freight car number 5318 was also in transit, and according to the answer, was then making a regular passage in a train passing over the railroad of the trustee, which was about to stop at different stations on the way, and the fixed times of its departure from such stations were on the same day. These cars were all within the provisions of R. L. c. 167, § 39, and

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could not be attached, in the absence of a demand by the officer for other property upon which to make the attachment equal in value to the *ad damnum* in the writ.

It is contended that this section does not apply to an attachment of cars and engines by trustee process. But we are of opinion that it does. There is no exception in the language, and the reason for its application is as strong in one case as in the other. On service of trustee process the party having possession of the cars and engines could not protect itself against the effect of allowing them to go back into the hands of the defendant without holding them and preventing the running of the trains. These cars cannot be held under the attachment.

The only other car referred to in the answer is freight car number 7828 which was on a side track in Vermont. Effect could not be given to an attachment of this car unless the trustee should bring it to Massachusetts, and there, at the proper time, deliver it to the officer holding the execution. The trustee was under no obligation to do this. The R. L. c. 189, § 59, applies only to property which the trustee is bound by contract to deliver at a certain time and place within the Commonwealth. But the rule there stated is analogous to the general principle which is applicable to attachments by trustee process. While we do not determine that under no circumstances can an attachment by trustee process of specific property outside of the Commonwealth be made effectual, we are of opinion that as a general rule, and upon facts like those in this case, such an attempted attachment is invalid. Our courts have no jurisdiction over the property itself while it is in another State, and we have no authority over the trustee to compel him to bring it here. *Van Camp Hardware & Iron Co.* v. *Plimpton*, 174 Mass. 208, 211. The trustee cannot be charged on account of the possession of this car.

The result is that the trustee is to be charged according to the order and ruling of the judge of the Superior Court.

So ordered.

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2. For the purpose of acquiring title to land by limitation, acts of disseisin and of letting the land to a tenant done by a town under a claim of right have the same effect as similar acts done by any other corporation or by an individual. In determining whether the possession of an actual occupant is the possession of the town all the acts of the town relating to the matter are to be considered. *Ibid.*
3. On the issue of the title to certain land claimed by a town under adverse possession beyond the period of limitation, the town can show by cross-examination of the claimant against the town that the witness never paid any taxes on the land and that he knew of no one paying taxes upon it for him or for any of the heirs at law of the ancestor under whom he claimed, this tending to show by inference that no taxes had been assessed because the town claimed title. *Ibid.*
4. To prove title by limitation in a town to certain land on a beach, the town may put in evidence entries on the books of the town treasurer showing the receipt of rent for the land, leases of the land made by its selectmen, and votes of the town authorizing the making of such leases by the selectmen and asserting the town's exclusive ownership of the land, tending, with the additional facts of occupation of the land by the lessees and payment of rent by them to the town, to show continuous and open possession of the land by the town through its lessees. *Ibid.*
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Adverse Possession (*continued*).

deal with the land, the town may put in evidence an indenture between the town and the owner of adjoining land, adjusting a boundary of the land in question, and containing a copy of a vote of the town referring the matter of the adjustment of the boundary to the selectmen with full power to act thereon. *Murphy* v. *Commonwealth*, 361.

6. On the issue of the title to certain land claimed by a town under adverse possession beyond the period of limitation, if the claimant against the town has testified that he went upon the land and told the lessee of the town that he owned it and then withdrew upon being told that he must settle the matter with the town, he cannot be asked in his own behalf what his intention was in going upon the land and informing the lessee that he owned it, as his undisclosed intention cannot affect the character of his act, or make it any the more an interruption of the peaceable possession of the town. *Ibid.*

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3. In an action by a servant against his employer for injuries from being kicked by a horse of the defendant alleged to be vicious, whose viciousness it is alleged the defendant by the exercise of reasonable care ought to have known, after evidence of specific instances of misconduct on the part of

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the horse, such as kicking and running away, further evidence of the reputation of the horse is admissible to prove the defendant's knowledge of his vicious qualities. For this purpose it is competent to show that because of such propensities the horse was driven with another horse by the defendant's servants as it was not thought safe to drive him alone, and also to show a conversation in the defendant's presence in which the horse was referred to as a "runaway." *Palmer* v. *Coyle*, 136.

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1. It is no defence to a complaint for assault and battery that the defendant was acting under the advice of counsel, which turned out not to be correct. *Commonwealth* v. *Middleby*, 342.
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1. A deputy sheriff attaching goods in a wholesale warehouse has a right to make a schedule of the goods before removing them, although after the

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goods attached are ascertained he cannot keep them on the premises. *Commonwealth* v. *Middleby*, 342.

2. On the question of what is a reasonable time to be taken by a deputy sheriff and his assistants in removing goods attached in a wholesale warehouse, it is proper to refuse to allow the proprietor, an experienced shipper familiar with the premises, to testify in his own behalf how long it would take to remove them. *Ibid.*

3. The rights of the owner of goods attached as against the attaching officer and his assistants are in no way affected by the right of the officer to ask for instructions as to the property to be attached from the plaintiff on whose writ he is making the attachment. *Ibid.*

4. Whether a deputy sheriff attached all the goods in a wholesale warehouse on a writ against the proprietor, after the proprietor had told him to go ahead and attach but that some of the goods were not his, or whether the attachment was only of a part of the goods, is a question of fact to be decided by a jury on consideration of what was said and done at the time as disclosed by the evidence. *Ibid.*

5. If the return of an officer states that he attached certain goods specifically described and at the same time attached other goods which he only identifies as goods of the defendant in a designated building, and further states that thereafter he released from attachment the goods not specifically described, the return discloses a valid attachment. *Smith* v. *Wenz*, 421.

6. After an application by a plaintiff for a sale under R. L. c. 167, §§ 82-96, of goods which have been attached, if the attaching officer by direction of the plaintiff, instead of proceeding with the proposed sale, removes and stores the attached goods and continues to hold them, the attachment remains good, as the plaintiff has a right to withdraw his application for a sale. *Ibid.*

Railroad rolling stock.

7. R. L. c. 167, § 39, providing that railroad cars and engines in use and making regular passages on railroads shall not be attached upon mesne process within forty-eight hours previous to their fixed time of departure unless the officer first demands other property upon which to make the attachment, applies to an attachment of cars and engines by trustee process. *Cox* v. *Central Vermont Railroad*, 596.

No right, under Vermont statute, to attach rolling stock leased to but never owned by defendant railroad company, see TRUSTEE PROCESS, 5.

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8. In determining the validity of an attachment the return of the attaching officer must be taken as true. If not true, the remedy is by an action against the officer for a false return. *Smith* v. *Wenz*, 421.

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Assignment for Creditors.

1. Under the bankruptcy act of 1898 an assignment for the benefit of creditors good at common law cannot be set aside by a trustee in bankruptcy if made more than four months before the filing of the petition in bankruptcy. *Hoague* v. *Cumner*, 296.

2. An assignment for the benefit of creditors good at common law is none the less valid in relation to the bankruptcy act of 1898 because no copy of

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it has been deposited with the clerk of the city or town in which the principal business of the debtor is carried on as required by R. L. c. 147, §§ 21, 22, for the purposes of proceedings in insolvency, those provisions having no reference to the bankruptcy act or to the rights of creditors at common law and like other parts of our insolvency law being suspended so long as the bankruptcy act continues in force. *Hoague* v. *Cumner*, 296.

Fraudulent Conveyance.

3. In an action by a trustee in bankruptcy against the wife of the bankrupt for a sum of money alleged to be the property of the bankrupt which he fraudulently placed in the hands of the defendant and she converted to her own use, the defendant can be asked on cross-examination what she did with the money received as part of the proceeds of certain property sold by her husband, and on her answers showing that a short time before her husband was examined in bankruptcy proceedings she drew the money out of a bank at her place of residence and deposited it in two banks thirty miles away and that in the bankruptcy proceedings both she and her husband refused to tell where the money was, she can be asked further whether it was not a long time afterwards that she used the money, this evidence being admissible upon the issue whether the defendant converted the money to her own use. *Mowry* v. *Reed*, 174.

4. A transfer by a husband through a third person to his wife cannot be avoided as fraudulent by the trustee in bankruptcy of the husband's estate merely by proving that the transfer was made with a design to settle the property on the wife, so that it should not be exposed to the hazards of the husband's future business or be liable for any future debts he might contract, but if a husband makes such a transfer with the actual intent of putting the property where it cannot be reached by creditors to satisfy debts which at the time he intends to contract and has reasonable ground to believe that he may not be able to pay, even if he does not have that intention as to any particular debt or debts and all his previous debts have been paid, the transfer can be avoided as fraudulent by the trustee in bankruptcy. In this case it was held that the evidence warranted such a finding. *Ibid.*

Discharge.

5. Where an administrator commits a breach of his bond and dies, and thereafter one of the sureties on his bond files a petition in bankruptcy and obtains a discharge, the discharge is a bar to an action against the bankrupt as surety on the bond, as the claim might have been proved in the bankruptcy proceedings. *Whether* the same rule applies in a case where the administrator has not died and there may be future breaches of his bond, *quære*. *Harmon* v. *McDonald*, 578.

BILLS AND NOTES.

What constitute.

1. An instrument containing an unconditional promise to pay a definite sum of money on a day certain is none the less a promissory note because it also

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contains a provision that unpaid interest shall bear interest at twelve per cent and that if an action is brought the customary attorney's fee shall be added to the amount of the judgment and taxed as part of the costs in the case. *Cherry* v. *Sprague*, 113.

Incomplete Instrument.

2. The provision of R. L. c. 73, § 33, that "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto," does not render incomplete a promissory note indorsed in blank by the payee and afterwards stolen from him by the maker and presented by the thief to a bank that discounts it in good faith, because such a note takes effect when delivered by the maker to the payee and is made payable to bearer by the payee's indorsement in blank before the theft. *Massachusetts National Bank* v. *Snow*, 159.

Alteration.

3. Under R. L. c. 73, § 141, when a negotiable instrument "has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." Whether such a holder of a note originally stated to be payable "with interest", no rate being named, and altered by the insertion of the words "seven per cent", must declare on the note as it was before the alteration in order to recover interest upon it at six per cent, *quære*. *Massachusetts National Bank* v. *Snow*, 159.

Indorser.

4. Under R. L. c. 73, §§ 83, 84, the indorser of a promissory note warrants to all subsequent holders in due course the validity of the instrument and that all prior parties had capacity to act, and this was the rule before the passage of the negotiable instruments act. *Leonard* v. *Draper*, 536.
5. In an action against indorsers of a promissory note who signed for the accommodation of the maker before the note was indorsed by the payee, the defences of invalidity and want of consideration are open under R. L. c. 73, § 81, in the same way that they would be in an action against the maker. *Ibid.*

Joint Promisor.

6. By the common law of this Commonwealth, apart from statutory provisions, a third person placing his name on the back of a promissory note before delivery to the payee is liable as a joint promisor without demand on the maker or notice of non-payment, and it need not be proved that he received a consideration for putting his name on the note. *Cherry* v. *Sprague*, 113.

Bearer.

7. Under R. L. c. 73, § 26, cl. 5, a promissory note indorsed in blank by the payee is payable to bearer. *Massachusetts National Bank* v. *Snow*, 159.
8. Under R. L. c. 73, § 207, if the maker of a promissory note wrongfully obtains possession of it after it has been indorsed in blank by the payee, he is the bearer within the meaning of the statute. *Ibid.*

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Holder in Due Course.

9. If the maker of a promissory note wrongfully obtains possession of it after it has been indorsed in blank by the payee, and presents it at a bank for discount, the fact that the bearer is the maker does not put the bank upon inquiry or prevent it from becoming a holder in due course within the meaning of R. L. c. 73, § 74, if it discounts the note in good faith without actual knowledge of any infirmity. See § 73 of the same chapter. *Massachusetts National Bank* v. *Snow*, 159.
10. Under the negotiable instruments act, now R. L. c. 73, §§ 18–212, a holder in due course of a promissory note payable to bearer can acquire a good title to the note from one who has stolen it. And *semble*, that this was so in this Commonwealth before the statute. *Ibid.*
11. If one, who has obtained by fraud a negotiable promissory note and as security for it a mortgage and mortgage note, sells and indorses the first named note before maturity and transfers it with its security to a *bona fide* purchaser for value, the purchaser takes a clear title to the note with its security which is good in equity as well as at law, and it does not matter whether the mortgage note held as security is negotiable. *White* v. *Dodge*, 449.

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BOSTON AND WORCESTER STREET RAILWAY COMPANY.

Constitutionality and construction of St. 1903, c. 163, as to trestle in highway and compensation to property owners damaged thereby, see CONSTITUTIONAL LAW, 8.

BOSTON ELEVATED RAILWAY COMPANY.

The persons entitled to damages from the Boston Elevated Railway Company under St. 1894, c. 518, § 8, are those having the interests described in the statute at the beginning of the construction of the railway of that company upon or in front of the premises for injury to which the damages are claimed. *Bates* v. *Boston Elevated Railway*, 328.

BOSTON PARK COMMISSIONERS.

Authority under St. 1893, c. 300, § 1, of Boston park commissioners to take as parkway Commonwealth Avenue in Boston from Arlington Street to Beacon Street, see PARKS AND PARKWAYS, 1.

Under St. 1875, c. 185, § 3, and St. 1893, c. 300, § 3, Boston park commissioners may forbid riding or driving on Commonwealth Avenue at speed exceeding eight miles an hour, see PARKS AND PARKWAYS, 2.

BOXING MATCH.

Under R. L. c. 207, § 12, making it a criminal offence to engage in, give or promote a public boxing match or sparring exhibition, if it appears that the public are invited and admitted to such a match or exhibition as to other places of amusement on tickets entitling them to seats varying in location according to the price paid, the exhibition may be found to be public, although the building is leased to a club and each applicant for a ticket is required to sign a request to become a member of the club, it being a question for the jury whether the machinery of the club is a mere sham and fraudulent contrivance to evade the law. *Commonwealth* v. *Mack*, 441.

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CAMBRIDGE.

Order of city council takes effect from date of approval by mayor, see MUNICIPAL CORPORATIONS, 1.

CARRIER.

There is a presumption of fact that a loss of articles from a package transported by express occurred in the hands of the last of two successive carriers. *Bullock* v. *Haverhill & Boston Dispatch Co.* 91.

Duty of railroad to put car containing freight where consignee can unload it safely, see NEGLIGENCE, 9.

Negligence on railroad, see NEGLIGENCE, 6–14.

Negligence on street railway, see NEGLIGENCE, 16–21.

Negligence on elevated railway, see NEGLIGENCE, 22.

In action against city for injuries on city ferryboat it is no defence that ignorant plaintiff and mother do not know name of ferryboat, see MUNICIPAL CORPORATIONS, 14.

Liability for injury from slipping on ice on city ferryboat, see MUNICIPAL CORPORATIONS, 13.

Negligence of passenger on ferryboat in driving up steep drop to landing place behind another team under certain circumstances is question for jury, see MUNICIPAL CORPORATIONS, 12.

City operating ferry as carrier liable for employees' failure to aid heavy team up steep incline from ferry to wharf with motor and blocks provided for purpose, even if negligence of third person contributed to accident, see MUNICIPAL CORPORATIONS, 10, 11.

CHARITY.

Perpetuity.

1. A gift by will of a fund to trustees for the establishment of a hospital for sick persons in indigent circumstances, to be held and accumulated for twenty-five years before it is put to active use, is not invalid although the time for accumulation extends beyond the limit prescribed by the rule against perpetuities. In such a case a charity is created at once, the equitable estate in that part of the public which is to be benefited as well as the legal estate in the trustees vesting immediately when the will is proved. *Codman* v. *Brigham*, 309.

Administration cy pres.

2. In a gift by will of a fund to trustees for the establishment of a hospital for sick persons in indigent circumstances, to be held and accumulated for twenty-five years and then to be transferred to a corporation to be formed for carrying out the purposes of the trust, the formation of the corporation and the transfer of the property to it are mere details of administration prescribed by the testator not affecting the general character of the charitable gift, and if for any reason the establishment of such a corpora-

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tion is impossible the gift does not fail, but the court will devise some method of administering the charity *cy pres* to accomplish substantially the same result. *Codman* v. *Brigham*, 309.

Management.

Powers of Roman Catholic church organized under R. L. c. 36, §§ 44–46, and of trustees of such church, see RELIGIOUS SOCIETY, 1, 2.

CIVIL SERVICE LAW.

The provision of St. 1904, c. 314, § 1, that "every person holding office or employment in the public service of the Commonwealth or in any county, city or town thereof, classified under the civil service rules of the Commonwealth, shall hold such office or employment and shall not be removed therefrom . . . except for just cause and for reasons specifically given in writing", does not extend the term of employment of a police officer appointed by the mayor and aldermen of a city for a specified number of years fixed by the provisions of the city charter. *Smith* v. *Mayor of Haverhill*, 323.

CONDITION.

In agreement to sell land at certain price per acre, conditions are concurrent, see CONTRACT, 16.

Where insurance policy against liability for injuries caused by negligence of insured provides for reimbursement for loss sustained and paid on judgment, payment of judgment by insured is condition precedent to liability, see INSURANCE, 2–6.

Where payment of order is conditioned on payment to maker under certain contract, payment under new substituted contract between same parties is not waiver of performance of condition, see CONTRACT, 15.

CONDITIONAL SALE.

See SALE, 1–3.

CONFLICT OF LAWS.

1. A promissory note payable in another State and sent by mail to the payee in that State is governed by the law of the State in which it is received and is payable. *Cherry* v. *Sprague*, 113.
2. A contract to guarantee the payment for goods sold to a certain person up to a certain amount by a dealer whose place of business is in another State, takes effect only when accepted by the dealer, and is to be construed by the law of the State where it is accepted. *Callender, McAuslan & Troup Co.* v. *Flint*, 104.

In suit in equity to enforce statutory liability of stockholder in foreign corporation upon claim not reduced to judgment, decision of court of State organizing corporation is not binding as to parties necessary in such suit, see EQUITY JURISDICTION, 14.

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Quære, whether creditor of foreign corporation can obtain in suit in State of its incorporation decree against non-resident stockholders not served with process sufficient for foundation of suit against such stockholders in this State, see EQUITY JURISDICTION, 13.

CONSPIRACY, CIVIL.

1. A conspiracy to deprive one of the benefit of a contract with another is unlawful. *Garst* v. *Charles*, 144.
2. The owner and manufacturer of a proprietary medicine, who sells it only to retail dealers under contracts binding them not to sell it at less than a specified price, may maintain a suit in equity against a retail druggist, who conspires with another person to have the other person buy the medicine from the plaintiff for the purpose of breaking the contract which he signs, by selling the medicine at the wholesale price to the defendant to be sold by him at retail at a price less than that specified in the contract, and who sells the medicine in accordance with this plan. In such a suit the plaintiff is entitled to an injunction, and to damages for the injury already suffered. *Ibid.*

CONSTABLE.

Action maintainable on bond of constable in Boston in name of city treasurer without obtaining authority from any public officer, see BOND.

CONSTITUTIONAL LAW.

Assessments.

1. The Legislature may authorize the re-assessment of a betterment tax if the original assessment has failed because of informality or other defect. *Warren* v. *Street Commissioners*, 290.
2. The assessment of betterments, if other necessary conditions exist, may be authorized by the Legislature as well after as before the expenditure is incurred. *Ibid.*
3. St. 1902, c. 527, authorizing assessments of betterments to be made within one year after the passage of the act for certain public improvements in Boston completed by that city within six years before the passage of the act, is constitutional, and was enacted to enable the city to assess betterments in cases where on account of the unconstitutionality of previous statutes or of illegality in the proceedings under them a valid assessment otherwise could not be made; therefore it includes authority to assess betterments for expenditures in the construction of Huntington Avenue which were illegal when incurred. *Ibid.*
4. St. 1902, c. 527, authorizing the re-assessment of betterments for certain improvements in Boston for which the previous assessments had been invalid by reason of unconstitutionality of statutes or of illegality in incurring the expenditures for which the assessments were made, is not unconstitutional on account of its provision exempting from such assessment the

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estates of owners who voluntarily have paid former invalid assessments in full and cannot recover them back, because under this statute only an amount not exceeding one half of the expenses incurred for the improvement can be assessed, and the Legislature is presumed to have assumed that all previous invalid assessments that had been paid in full without protest were greater than could be assessed under the present statute and therefore that the owners of other estates cannot suffer from their exemption. *Warren* v. *Street Commissioners*, 290.

5. In authorizing the assessment of betterments by § 14 of St. 1896, c. 516, providing for the construction and maintenance of the south terminal station in Boston, the Legislature properly treated the changes in the streets and the construction of the station as parts of a single public improvement constituting one joint enterprise which would bring special and peculiar benefits to the estates in the vicinity, and such authorization of the imposition of betterments is constitutional. Following Sears *v.* Street Commissioners, 180 Mass. 274. *Wells* v. *Street Commissioners*, 451.

Equal Protection of the Laws.

6. R. L. c. 112, § 72, requiring street railway companies to carry pupils of the public schools to and from school at rates not exceeding half the regular fare charged for the transportation of other passengers between the same points, is constitutional, although by § 1 of the same chapter it does not apply to the Boston Elevated Railway Company, and although the privilege extends only to pupils of the public schools, this being a police regulation in the interest of education, and it being assumed that the Legislature was satisfied that no railway company would suffer loss from carrying school children at half the regular fare. *Commonwealth* v. *Interstate Consolidated Street Railway*, 436.

St. 1902, c. 527, exempting from re-assessment of betterments persons who have paid former invalid assessments and cannot recover them back, is constitutional, see *ante*, 4.

Police Power.

7. R. L. c. 73, §§ 7, 8, imposing certain penalties for issuing obligations to be redeemed in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder, is constitutional as a reasonable exercise of the police power. *Attorney General* v. *Preferred Mercantile Co.* 516.

R. L. c. 112, § 72, requiring certain street railway companies to carry public school children for half fare is constitutional exercise of police power, see *ante*, 6.

Eminent Domain.

Compensation for damage from trestle in highway.

8. By St. 1903, c. 163, the Boston and Worcester Street Railway Company was authorized to construct and maintain a wooden trestle over and across the tracks of the Boston and Albany Railroad on Boylston Street in Newton, which should be discontinued and removed upon the completion of the work of the abolition of the grade crossing of the tracks of that

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railroad with Boylston Street. Section 3 is as follows: "The construction, maintenance and use of the said trestle shall be deemed not to be an additional easement or servitude. If any person is legally damaged in his property by the construction, maintenance or use of the said trestle the damages may be assessed by a jury of the Superior Court upon proceedings conducted as provided with respect to the laying out of ways in the city of Newton." *Held*, that the statute is constitutional, the section quoted declaring that the trestle does not interfere with rights of property if the Legislature can make such a declaration, or, if such a declaration cannot be made constitutionally, that any person whose property rights are interfered with shall have compensation. *Held, also*, that the statute is not unconstitutional by reason of failing to designate the person who is to pay the compensation found to be due, as the statute must be construed to provide that in case damages are suffered the compensation shall be paid by the railway company for whose benefit alone the permission to construct the trestle is granted, and that the remedy of the owner of property so damaged is exclusively under the statute and not by a bill in equity. *Lentell* v. *Boston & Worcester Street Railway*, 445.

CONTEMPT.

1. A plaintiff in a suit in equity, who is in contempt for failing to obey an injunction granted on a cross bill in the same suit, cannot go on with his case against the defendant as a matter of right, and this court will not grant a writ of mandamus directing the justices of the Superior Court to proceed with the hearing of his suit in that court. *Campbell* v. *Justices of the Superior Court*, 509.
2. Whether in a suit in equity the court properly can order a party, who is in contempt for failing to obey an injunction in the suit, to pay a sum of money to the adverse party in compensation for the damages caused by his violation of the injunction, *quære*. *Ibid.*

CONTRACT.

What constitutes.

1. An unexpressed intention of a party to a contract not communicated to the other party in no way can bind or prejudice the party ignorant of it. *Farnum* v. *Whitman*, 381.
2. In an action of contract, where it appears that oral negotiations between the parties were followed by a correspondence in writing, the questions, whether a contract was made in part by word of mouth and in part by the correspondence in writing, and if so what that contract was, finally must be passed upon by the jury under proper instructions from the court, but in giving such instructions the court must deal with the question whether the correspondence in writing properly interpreted changed the mere negotiations, if they were such, into a contract. *Ellis* v. *Block*, 408.
3. In an action for breach of a contract, alleged to have been made by the defendants, to form a proposed corporation and employ the plaintiff at a

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certain compensation to sell its stock, two letters of the defendants to the plaintiff, one stating that all overdue accounts must be settled before any preparations can be made and another stating that the defendants wish to syndicate their plants but cannot do it so long as their overdue accounts are unpaid, and that if the collecting of the accounts is attended to quickly by the plaintiff both the plaintiff and the defendants can make some money, do not constitute an acceptance of a proposition previously discussed by the parties that the plaintiff shall remain in the employ of the defendants as their agent until the outstanding debts are collected and that the defendants then shall form a corporation and employ the plaintiff to sell its stock. *Ellis* v. *Block*, 408.

Implied: Common Counts.

4. If an action is brought to recover money paid under an oral contract not to be performed within a year, wrongfully terminated by the defendant at the end of ten months, and after a verdict for the plaintiff exceptions of the defendant are sustained by this court on the ground that the plaintiff has not shown that the oral contract has been made unenforceable by the defendant setting up the statute of frauds, and thereupon the plaintiff brings an action on the oral contract in which the defendant sets up the statute as a defence, in a new trial of the first action the plaintiff may put in evidence the record in the second action to show that the defendant has set up the statute as a bar to an action on the contract, and thus recover on the common count, although the setting up of the statute is in another action brought after the date of his writ. *DeMontague* v. *Bacharach*, 128.
5. If one carrying on a restaurant in connection with the bar room of another at the request of the proprietor of the bar room employs and pays an additional servant to work at the bar preparing liquor to be served and drunk in the restaurant, and if on demand by the restaurant keeper for compensation on this account the proprietor of the bar room promises an adjustment of his claim, the proprietor of the bar room can be found to be liable to the restaurant keeper for the extra expense thus incurred. *Ibid.*
6. If one carrying on a restaurant in connection with the bar room of another, upon complaint by the proprietor of the bar room that customers at the restaurant who desire liquor are not served promptly, furnishes, or performs personally in superintendence, services in the restaurant in regard to the serving of liquor without any promise of the proprietor of the bar room to pay for them, the services are voluntary and cannot support an action of contract for labor performed and furnished. *Ibid.*
7. In an action for money paid under an oral agreement by which the plaintiff was to carry on a restaurant for a period of two years in connection with a bar room of the defendant, if it appears, that the defendant wrongfully terminated the arrangement at the end of ten months and when sued by the plaintiff for damages set up the statute of frauds, and, if it further appears, that the defendant received from the plaintiff payments of money to a large amount under the oral contract during the ten

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months before he repudiated it, the plaintiff in suing on the common counts is not entitled to recover necessarily the same amount of money that he paid, as the jury may find that the plaintiff derived benefit from the privilege of carrying on the restaurant in the bar room while he enjoyed it, which exceeded any benefit received by the defendant from the restaurant being carried on in connection with the bar, so that the damages to be recovered, if any, must be ascertained by an estimation of all these elements; and for this purpose the plaintiff can show that the privilege of carrying on the restaurant was worthless unless the defendant paid an agreed percentage on liquor sold there and that the defendant had not done this. *DeMontague* v. *Bacharach*, 128.

Validity.

Contract made by purchaser under contract of conditional sale to waive rights as to demand, account, redemption and sale given by R. L. c. 198, § 13, is void, see SALE, 1.

To prove contract void as wagering contract both parties must be shown to have assented to things which made it wager, see WAGERING CONTRACTS, 1.

On issue of validity of certain transaction in Chicago board of trade alleged to be wagering contract, evidence of method of delivery of wheat in board of trade held competent as to plaintiff's readiness and willingness to perform, see WAGERING CONTRACTS, 3.

In action for balance due on certain transaction alleged to be wagering contract plaintiff may testify in rebuttal that there was no agreement that contract should be settled by payment of differences, see WAGERING CONTRACTS, 2.

Consideration.

8. The delivery of shares of stock in a corporation, supposed at the time to be of value but afterwards proving to be worthless, is a good consideration for a promissory note given in payment for the shares. *Leonard* v. *Draper*, 536.

Construction.

9. In the construction of an instrument in writing clauses should not be construed as repugnant if by any reasonable interpretation they can be reconciled so as to give force and effect to each. *Ferguson* v. *Union Mutual Life Ins. Co.* 8.

10. Whether an instrument in writing is a lease or a contract for the use of the premises as licensee is a question of law. *Roberts* v. *Lynn Ice Co.* 402.

11. If a manufacturer of goods employs a travelling salesman for one year under an agreement by which the manufacturer agrees to pay the salesman at the end of the agreement a certain percentage on net sales of all goods and a certain other percentage on the net profits of the manufacturer's business, and that in the meantime the salesman is to be allowed "to draw for his maintenance and support during the term of this agreement, a sum equal to $100 per week", in addition to travelling expenses, which is to be deducted from the sum the salesman shall be found to be

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entitled to at the termination of the agreement, this does not guarantee to the salesman on final settlement the sum of $100 per week during the continuance of the agreement. *Menage* v. *Rosenthal*, 470.

Of letters in view of preliminary oral negotiations, see *ante*, 2.

In construing ambiguous provision for forfeiture in life insurance policy meaning most favorable to assured should be adopted, see INSURANCE, 7, 8.

Provision in contract for laying track that work shall be "subject to the direction and acceptance of the engineer" of the railway company, gives him no control of actual execution of work and does not make workmen employed servants of railway company, see MASTER AND SERVANT, 3.

Building Contracts.

12. A provision in a building contract, that the decision of the architect as to the interpretation of the specifications and on all questions relating thereto shall be final and binding upon the owner and the contractor, is valid, and when a decision thereunder has been made by the architect it is binding on the parties. *Norcross* v. *Wyman*, 25.

13. A contract under seal for the construction of a building contained the following provision: "The architects shall be the sole interpreters of their drawings and these specifications, and except as otherwise provided or specified, their decision upon all questions relative to drawings, specifications or contract for the said building shall be final and binding upon the owner and the contractor." By the contract, which included the specifications and plans, the contractor was required to provide a suitable foundation for the building. He encountered a quicksand which required more work than had been anticipated. The architects decided that the expense of the work made necessary by the quicksand was extra work not included in the contract price. After this decision had been communicated to the contractor, the owner was notified and refused to be bound by it. *Held*, that under the agreement of the parties the decision of the architects was final, and that for the purposes of their decision they were free to adopt such legal principles as they honestly believed to be applicable and to act on such evidence as they chose to receive, and whether the contract by its true construction required the plaintiff to excavate the quicksand was immaterial. *Held, also*, that, regarding the refusal of the owner to accept the architects' decision as an attempt to revoke the power conferred on the architects by the contract, the power having been conferred by an instrument under seal could not have been revoked by parol, and that an attempted revocation under seal by the owner would have come too late after the decision of the architects had been communicated to the contractor, even if the owner had had a right, which he had not, to rescind the contract containing the provision conferring the power. *Ibid.*

Performance and Breach.

14. It is no defence to an action by a contractor against a city for refusing to proceed with the work contracted for, that the plaintiff did not complete the work within the time fixed by the contract, if the sole cause of

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the plaintiff's delay was an injunction, served on both parties to the contract in a suit in equity brought by ten taxable inhabitants under Pub. Sts. c. 27, § 129, (R. L. c. 25, § 100,) to restrain the expenditure called for by the contract, and subsequently dissolved. *Webb Granite & Construction Co.* v. *Worcester*, 385.

15. If an order for the payment of money is accepted as payable out of the first payment to which the maker of the order shall become entitled under a certain contract with the acceptor, and the first payment under that contract never is made because of a failure of the maker to perform the conditions precedent required before its payment, the fact that a payment is made by the acceptor of the order to the maker of the order under a new and independent contract does not waive the performance of the conditions under the first contract or make the acceptor in any way liable to the payee of the order. *Glidden* v. *Massachusetts Hospital Life Ins. Co.* 538.

16. In a suit in equity to enforce the specific performance of a contract by which the defendant agreed to sell certain land to the plaintiff for the sum of $50 per acre at any time before the expiration of a certain lease, the conditions of the contract being concurrent the plaintiff need not prove a tender of the purchase money. It is sufficient for him to show that he notified the defendant that he would take the land and pay the price, and was ready and able and offered to do so, and that the defendant refused to convey the land and did not intend to keep his agreement. A request by the plaintiff that the defendant should have a survey of the land made, this being necessary to determine how much should be paid, does not excuse the defendant's refusal to convey, especially if he did not base his refusal on that ground. *Cole* v. *Killam*, 213.

Evidence of method of delivery of wheat in Chicago board of trade held competent as to plaintiff's readiness and willingness to perform contract sued upon, see WAGERING CONTRACTS, 3.

Rescission.

Power of decision conferred on architect by building contract under seal cannot be revoked by parol, and revocation under seal is too late after decision made, see *ante*, 13.

CONVERSION.

1. If, in reply to a demand of the owner of personal property for its delivery, the person having possession of the property denies having possession of any property belonging to the person making the demand and says that if he had any of the articles demanded he should refuse to deliver them, this is evidence of the exercise of dominion over the chattels, a denial of the demandor's title and an exclusion of the owner from possession, which can be found to be a conversion. *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway*, 500.

2. In an action for the conversion of chattels sold by the plaintiff under a contract by which he was to retain the title until the purchase money had

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been paid in full, the defendant cannot show in reduction of damages that the debt has been reduced by part payments so that the amount of the purchase money unpaid is less than the market value of the property converted. In such a case the ordinary rule applies that the plaintiff can recover the value of the property at the time of the conversion with interest from the date of the conversion to the date of the verdict. *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway*, 500.

On question whether wife of bankrupt converted to her own use property which he fraudulently placed in her name she may be asked what she did with the money and how long afterwards she used it, see BANKRUPTCY, 3.

Rails of street railway company laid in public street subject of conversion, see STREET RAILWAY, 2.

CORPORATION.

A corporation unless forbidden by statute to do so may purchase shares of its own stock. *Leonard* v. *Draper*, 536.

Street railway company may purchase shares of its own stock, see STREET RAILWAY, 1.

As to application to corporation or officers by member of corporation before bringing suit against it, see EQUITY JURISDICTION, 16.

Information by attorney general in nature of *quo warranto* is proper proceeding to enforce forfeiture of charter of domestic corporation under R. L. c. 73, § 8, for violation of § 7 of same chapter, see INFORMATION.

Necessary parties to suit to enforce statutory liability of stockholder in foreign corporation, see EQUITY JURISDICTION, 12.

As to the effect of decision of court of another State as to procedure and practice in enforcing liability of stockholder in corporation organized there, see EQUITY JURISDICTION, 14.

Quære, whether creditor of foreign corporation can obtain in suit in State of its incorporation decree against non-resident stockholders not served with process sufficient for foundation of suit against such stockholders in this State, see EQUITY JURISDICTION, 13.

COSTS.

Taxation of, see PRACTICE, CIVIL, 31, 32.

DAMAGES.

For Property taken under Statutory Authority.

1. In assessing damages to real estate taken for public purposes under a grade crossing act, if the petitioner is a mortgagor and the mortgagee waives his right to be heard, the petitioner as mortgagor is entitled to recover the damages. *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 45.

2. Under St. 1900, c. 472, a special act providing for the abolition of certain grade crossings in Fall River and incorporating the provisions of the general grade crossing acts in regard to damages, the owner of a wooden

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Damages (*continued*).

building standing on the land of another, holding the land under the building as a tenant at will, is entitled to damages for injury to the building and to his estate at will from a change of grade in a public way on which his building abuts. In assessing such damages the nature of the petitioner's title and the right of the owner of the land to terminate the tenancy by grant or by giving the notice required by statute should be considered. *Sheehan* v. *Fall River*, 356.

3. One owning a building abutting on a street, the grade of which has been changed in the abolition of a grade crossing, is entitled under the provisions of the grade crossing acts to damages for impairment of the use of his building by access to it being made more difficult although not entirely cut off while the work was going on, this being a special and peculiar injury not shared by the public. *Ibid.*

4. In assessing damages to real estate in which there are leasehold interests and the reversion is owned by a corporation, taken for public purposes under a grade crossing act, the rule is to ascertain the total amount of damages sustained by the owners, "estimating the same as an entire estate and as if it were the sole property of one owner in fee simple," and then to apportion the damages among the several parties "entitled thereto, in proportion to their several interests and to the damages sustained by them, respectively," as provided in R. L. c. 48, § 22, in reference to proceedings under § 20 of that chapter. *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 45.

5. St. 1900, c. 472, providing for the abolition of certain grade crossings in Fall River, did not on its passage transfer the title to the lands and rights in land appropriated thereunder to the public use, and the time of the taking from which interest is to be computed in assessing damages, on the petitions of the owners of such lands and rights, is the date of the filing of a plan and recording of a statement in the registry of deeds signed by the mayor of the city and the engineer of the railroad company. *Ibid.*

6. Under St. 1900, c. 472, providing for the abolition of certain grade crossings in Fall River, interest on damages for the taking of lands and rights in land is to be computed from the time of the taking and not from the time of the subsequent entry on the land for making the authorized changes. R. L. c. 48, § 13, in regard to the assessment of damages from the relocation or alteration of a highway has no application. *Ibid.*

Under St. 1894, c. 548, § 8, damages from the construction, maintenance and operation of the lines of the Boston Elevated Railway Company are to be awarded to the persons having the interests described in the statute at the beginning of the construction complained of, see BOSTON ELEVATED RAILWAY.

Under R. L. c. 48, § 114, and R. L. c. 111, §§ 112, 113, entire damages assessed for mortgaged property, and judgment awarded to each mortgagee in order of mortgage, see EQUITY JURISDICTION, 18.

Where grade crossing act provides for raising side walls of street but abutters have right to reasonable openings for access, damages should be assessed as if such openings were made, see GRADE CROSSING ACTS.

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From Change of Grade in Highway.

7. A petition under Pub. Sts. c. 52, § 15, for damages from a change of grade in a highway of a town is filed properly if it is taken to the office of the selectmen of the town and handed to one of the selectmen in the presence of two others although the board is not in session at the time and no record of the filing is made. *Garvey* v. *Revere*, 545.
8. At the hearing of a petition under Pub. Sts. c. 52, § 15, against a town for damages from a change of grade in a highway, it is proper to exclude evidence offered by the town to show that the change of grade was necessary in order that a system of drainage not authorized at the time but afterwards put in might be adopted, because the measure of damages is the difference between the value of the petitioner's property immediately before the change of grade and immediately after it, less any special benefit and advantage to his estate caused by the change of grade, and the reasons for the change of grade are immaterial. *Ibid.*
9. At the hearing of a petition under Pub. Sts. c. 52, § 15, against a town for damages from a change of grade in a highway, it is proper to exclude evidence offered by the town to show that by reason of the change of grade it became possible to make certain improvements such as the construction of sidewalks and the laying of surface drainage and sewer pipes, these being improvements for which special assessments could be laid upon the abutters under the Public Statutes. *Ibid.*

Certain change of grade of highway held to be done in the way of ordinary repairs in regard to which superintendent of streets was agent of town and for which abutter could recover damages, see WAY, 4.

For other cases of damage to real and personal property from change of grade in highway, see *ante*, 1–6, *post*, 10.

Interest as Compensation for Delay.

10. In an action of tort for injury to the plaintiff's real estate by a change of grade in the street on which it is situated made by a railroad company as an approach to a new station without authority, if the plaintiff, instead of bringing his action when the acts of the defendant causing the injury were completed, has by reason of a mistake of remedy delayed the bringing of the action for nearly three years, the jury in assessing the damages may add to the damages for the injury to the property at the time of the completion of the acts of the defendant an additional sum computed as interest at the legal or any reasonable rate as compensation for the delay to which the plaintiff has been subjected. *Peabody* v. *New York, New Haven, & Hartford Railroad*, 489.

For determination of damages in action on common counts to recover money paid under an oral agreement for carrying on a restaurant in a bar room not to be performed within a year, see CONTRACT, 7.

In action by seller under contract of conditional sale against buyer for conversion of chattels so sold, part payments cannot be deducted from value of property at time of conversion, see CONVERSION, 2.

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Damages (*continued*).

What evidence of depreciation of real estate is admissible depends on circumstances and is largely in discretion of judge, see EVIDENCE, 12.

On issue of injury to real estate, certain evidence of price paid for property before and after injury and of rental before purchase by plaintiff held admissible, see EVIDENCE, 13.

DECEIT.

1. A married woman, if induced to give up an inchoate right of dower in certain real estate by false and fraudulent representations, has been deprived of a valuable right in property and is entitled to damages. *Garry* v. *Garry*, 62.
2. A married woman may maintain an action of tort for deceit against the brother of her husband for a false representation that the plaintiff's husband was to receive one half of the proceeds from the sale of certain real estate owned in common by the two brothers, whereby the plaintiff was induced to release her inchoate right of dower in one undivided half of the real estate, when in fact the plaintiff's husband by a previous secret conveyance had released his interest in the real estate to his brother and was to receive no part of the purchase money. *Ibid.*

DEED.

Confirmatory.

1. A purely confirmatory deed, given to replace one of the same tenor supposed to be lost, conveys no title and is merely evidence of the original deed. Oral evidence is admissible to identify the lost deed referred to and to show the time of its delivery, such evidence having no tendency to contradict or enlarge the meaning of the new deed. *Scaplen* v. *Blanchard*, 73.

Construction.

2. In the absence of anything expressly indicating a contrary intention, the words "heirs at law" in an instrument of gift indicate those who are such at the time of the death of the ancestor referred to. *Merrill* v. *Preston*, 197.
3. By a deed of trust a portion of a fund upon the death of a beneficiary for life was to go to H., "if then living, but if then deceased to his heirs at law." H. died before the beneficiary for life. *Held*, that, there being nothing in the deed to indicate a contrary intention, the heirs at law of H. who were to take upon the death of the beneficiary for life were to be ascertained as of the time of the death of H. *Ibid.*

Effect of exception in covenant.

4. A clause in a covenant against incumbrances in a deed, excepting from the covenant a right to pass and repass on a certain road over the land conveyed, merely modifies liability upon the covenant, and does not estop the grantee from denying the right described; still less is it an exception or a reservation from the grant. *Wendall* v. *Fisher*, 81.

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Notice of Equities.

5. Under R. L. c. 127, § 2, a quitclaim deed in the ordinary form to a purchaser for a valuable consideration without notice conveys a title free from equities, and the burden of proving notice is on one alleging it. *Livingstone* v. *Murphy*, 315.

6. No notice is given of a resulting trust by a recital in a deed by a deputy sheriff to a wife in pursuance of a sale on an execution against her husband, that the consideration named in the deed was paid by the wife, as such a deed passes no legal title to which the equitable right can attach. *Ibid.*

Registration.

7. A forged instrument gains no validity from being recorded in the registry of deeds and a *bona fide* purchaser of land which would be affected by it if it were genuine gets no better title by relying on it as recorded. *Breed* v. *Gardner*, 300.

Unrecorded Grant.

8. An instrument executed under seal by the owners of adjoining lots of land, purporting to establish the boundaries of a right of way, although unrecorded, is binding upon subsequent owners of the servient lot having notice of its existence. *Wendall* v. *Fisher*, 81.

Fact that real estate subject to mechanic's lien is conveyed for purpose of having grantee give bond to dissolve lien does not in itself invalidate deed, see MECHANIC'S LIEN, 3.

DEVISE AND LEGACY.

Construction.

In general.

1. A will in the handwriting of the testator drawn without the aid of counsel contained the following provisions: "I direct my executors to proceed with moderation and patience but with due diligence to the winding up of my estate, largely consisting of real estate which is in my opinion of considerable value but more or less encumbered. My immediate assets of any considerable amount are my life policy in $2,500, originally but now swollen by the regular addition of the company's dividends. . . . Both of these above named policies are with the New England Mutual Life Ins Co of Boston. Then after the payment of debts and the legacies above named I direct the division of the net proceeds into parts, one for each of my children as follows," naming the testator's four daughters and one son, and providing that the daughters' shares should be held for their benefit by a trustee named. No executor was named in the will, and administrators with the will annexed were appointed. *Held*, that the will disposed of the proceeds of the testator's real estate as well as of his personal property, and that the legal title to the real estate vested in the five children of the testator, subject to a power coupled with a trust in the

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administrators with the will annexed, to sell the property to pay debts and legacies, and then to pay the net proceeds four fifths to the trustee for the testator's four daughters and one fifth to the testator's son. *May* v. *Brewster*, 524.

Supplying omitted words.

2. A testator after giving to his wife the income of all the residue of his estate, with the right to use the principal, provided as follows: "and upon the decease of my wife, so much of said residue as may then remain is to be equally divided between my two sons. — and in case of either of my sons shall die, during the lifetime of their Mother, leaving no issue, then the whole of said residue or remainder is to go to the survivor of them, and in case both of my sons shall die during the lifetime of their mother — then she is to dispose of said estate, as she shall think best. —" The two sons survived their father and both died before their mother, one of them leaving issue. Their mother died testate, and by the terms of her will disposed of the whole residue of her husband's estate under the above testamentary power, although the issue of one of her deceased sons survived her. *Held*, that the power was exercised properly and disposed of the whole property, the power of disposition over the whole property passing to the widow on the death of her two sons although one of them left issue, there being nothing to justify the court in adding the words "without issue" to the contingency named in the second gift over. *Todd* v. *Tarbell*, 480.

What estate passes.

3. The will of a married woman left all her property real and personal to her husband, "to have and to hold the same to him, his heirs, executors, administrators and assigns forever," and added: "It is my will, in consideration of the fact that I have heirs who are worthy, that my said husband shall leave by his will after my decease, should I decease before him, the property of whatever kind to my heirs." *Held*, that the absolute devise of the real estate to the husband in fee was not affected by the subsequent clause attempting to reduce the fee to a life estate, and that no trust was created for the benefit of the heirs of the testatrix. *Merrill* v. *Webster*, 562.

Whether power created.

4. A testator left a fund in trust, to pay the income to a son during his life, "and at his death the principal to distribute among those persons who would be legally entitled to receive the same were it given to him absolutely and he owing no debts." The son died testate leaving a wife and adopted daughter, and by his will gave $100 to his adopted daughter and "the balance" of all his property both real and personal to his wife. *Held*, that no power of appointment in the son could be inferred from the above bequest in trust, that the son by his will did not undertake to dispose of the trust fund held under the will of his father which was not his property, and therefore that the will of the son must be disregarded in distributing the fund under the will of the father, the result being that one third of it should be paid to the widow and two thirds to the adopted daughter. *Otis* v. *March*, 298.

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Who entitled.

5. A testatrix at the time of making her will had a man F. and his wife A. in her service who had been in her employ for many years, both before and after their marriage to each other. By her will she left a fund to trustees "to pay to F. who now works for me, the income and net profits arising therefrom during his life; and after the decease of said F. to pay the said income to his present wife, if she shall survive him, during her life, and after the decease of said F. and wife, to pay, distribute and divide the said principal fund, however the same may be then invested, to and among the children of said F. and wife and the issue of any deceased child by right of representation." F. had a child by a former marriage, who survived both F. and his second wife A. There also were children by the second marriage who were living when the will was made and who survived their parents. *Held*, that the expression "the children of said F. and wife" as used in this clause meant only the children of their marriage, and did not mean the children of each of them, so that the child of F. by the former marriage was excluded from the distribution. *Crapo* v. *Pierce*, 141.

Property included.

6. A will contained the following: "I devise to my wife A. the cottage house and the land 'appertenant' thereto. Being the house I now live in and situate on William Street in Fall River." Then followed an attempted description, which gave the boundaries only of the lot first owned by the testator on which the house originally was built and omitted a strip of land belonging to the testator, extending twenty-three feet farther on William Street, on which stood the greater part of an ell, which had been added by the testator to his house, and all of his barn, with a path and also a plank walk between the house and the barn, used as an outside kitchen, and a vegetable garden. *Held*, that the erroneous description must yield to the intention of the testator that his wife should have not only the whole of the house and the land under it but also the rest of the twenty-three feet used as appurtenant to the house, extending to a lot sold by the testator before his death, revoking by such sale a devise of the last named lot contained in his will. *Millerick* v. *Plunkett*, 97.

DISCRETION OF COURT.

Not within discretion of presiding judge to exclude material evidence because he thinks that sufficient evidence on point already has been introduced, see PRACTICE, CIVIL, 8.

DIVORCE.

As to ceremony of marriage with person against whom divorce has been granted within two years under Pub. Sts. c. 146, § 22, and proof necessary to make such marriage valid under provisions of R. L. c. 151, § 6, see MARRIAGE.

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DOMICIL.

Acquisition and change of, see TAX, 2.

DOWER.

Under Pub. Sts. c. 127, § 18, the widow of one dying testate, who has made no provision for her in his will, can establish her right to dower only by filing in the registry of probate within six months after the probate of the will a writing signed by her claiming such portion of his estate as she would be entitled to if he had died intestate. *Shelton* v. *Sears*, 455.

Wife may bring action of tort for deceit for false representations which induced her to give up inchoate right of dower in husband's real estate, see DECEIT, 1.

DYNAMITE.

Duty of one blasting rocks with dynamite to make inspection after every blast to guard against accident from unexploded portion of dynamite remaining in one of the holes drilled to receive it, see NEGLIGENCE, 36.

Powder man charging holes with dynamite is not superintendent of men drilling, but in inspecting holes after blasts is exercising superintendence, see NEGLIGENCE, 29.

EASEMENT.

For equitable restriction confined to house about to be built, see EQUITABLE RESTRICTION, 2.

Semble, that on petition under R. L. c. 182, § 11, court cannot consider fact that changed circumstances make enforcement of restrictions inequitable, see EQUITABLE RESTRICTION, 1.

Exception in covenant against incumbrances of right of way in land conveyed merely modifies that covenant and not the grant, see DEED, 4.

Unrecorded instrument establishing right of way is binding upon subsequent owners of servient lot having notice of its existence, see DEED, 8.

ELEVATED RAILWAY.

No evidence of negligence of railway company that woman's leg went down between platforms of cars in opening increased by curve of track at station, see NEGLIGENCE, 22.

As to injury to one under elevated structure from snow falling from above, see NEGLIGENCE, 4.

Under St. 1894, c. 548, § 8, damages from the construction, maintenance and operation of the lines of the Boston Elevated Railway Company are to be awarded to the persons having the interests described in the statute at the beginning of the construction complained of, see BOSTON ELEVATED RAILWAY.

Constitutionality and construction of St. 1903, c. 163, as to trestle in highway and compensation to property owners damaged thereby, see CONSTITUTIONAL LAW, 8.

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ELEVATOR.

To prove that defendant was in control of certain elevator at time of accident, evidence is admissible that shortly before accident defendant procured and maintained indemnity insurance against loss from accidents in operating elevator, see EVIDENCE, 16.

EMBEZZLEMENT.

Requisites of indictment for, see LARCENY, 2.

Allegation that money embezzled belonged to certain person supported by proof of special property in him, see PLEADING, CRIMINAL.

EMPLOYERS' LIABILITY ACT.

Under the employers' liability act the signature to a notice of the time, place and cause of injury is sufficient if signed with the name of the plaintiff's attorney by the attorney's stenographer to whom he dictated it. *Greenstein* v. *Chick*, 157.

For cases of employer's liability both under the act and at common law, see NEGLIGENCE, 25–45.

EQUITABLE RESTRICTION.

1. *Semble*, that on a petition under R. L. c. 182, § 11, to determine the validity, nature and extent of a restriction appearing of record to have been imposed on the petitioner's land more than thirty years before the filing of the petition, the question whether changed circumstances have made the enforcement of the restriction inequitable cannot be raised. *Welch* v. *Austin*, 256.

2. A grantor, owning adjoining land with a house on it, conveyed a lot on the corner of Arlington Street and Marlborough Street in Boston, by a deed containing the following provision: "The premises are however conveyed subject to the following restrictions and agreements: The dwelling house to be built on the granted premises shall be set back five feet from the line of Arlington Street, and shall not exceed sixty-five feet in depth from said street so as to correspond in this particular with my adjoining house. The front elevation and the material used in the construction of the front on Arlington Street shall correspond with my house adjoining according to the plan of G. J. F. Bryant herewith to be recorded, including a projection of about one foot on the front line as indicated on said plan. Two or three windows may be inserted in the front elevation from the second floor up, and one or two in the basement floor as may be preferred by the grantee or his representatives. The front on Marlborough Street shall be of freestone, and shall correspond as nearly as may be with the front on Arlington Street." *Held*, that the provision was more than a personal covenant and created a restriction for the benefit of the adjoining land of the grantor, but that this restriction was confined to the house about to be built when the deed was given and continued only so long as that house existed. *Ibid.*

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EQUITY JURISDICTION.

To reach and apply Equitable Assets.

1. R. L. c. 159, § 3, cl. 7, giving a creditor the right to reach and apply to the payment of a debt equitable assets of his debtor deals with existing equitable rights and does not authorize a court of equity to complete inchoate rights to create property which then would be subject to attachment by trustee process in an action at law. *Connolly* v. *Bolster*, 266.
2. A claim for loss of rent, under a covenant in a lease that in case the lease is terminated by the lessor for breach of covenant the lessee shall be liable for all loss and damage of the lessor from the premises remaining unleased for the remainder of the term, is a debt within the meaning of R. L. c. 159, § 3, cl. 8, giving equity jurisdiction to reach and apply in payment of a debt property of the debtor fraudulently conveyed. *Woodbury* v. *Sparrell Print*, 426.
3. A suit in equity to reach and apply property, alleged to have been conveyed fraudulently by the defendant, in payment of a debt to the plaintiff for loss of rent, under a covenant in a lease to pay for such loss if the premises remain unleased during the remainder of the term after the lessor has terminated the lease for breach of covenant, or if the premises are let after such termination for a rent less than that reserved in the lease, is brought prematurely if the bill is filed while the premises continue to remain unleased and before the end of the term of the lease, as the amount of the loss cannot be determined at that time and therefore is not payable. *Ibid.*
4. In a suit in equity to reach and apply to the payment of a debt property alleged to have been conveyed by the debtor to his sons in fraud of creditors, if it appears that the debt due to the plaintiff is a little over $6,000, that the property conveyed to the sons was worth $4,100, and that the debtor owed his sons $2,600, it may be found that there was no fraud in the transaction, a mere preference of particular creditors not being a fraud apart from statute. *F. & M. Schaefer Brewing Co.* v. *Moebs*, 571.

Laches.

5. A bill to redeem real estate from a foreclosure under a mortgage, voidable because of fraud and mismanagement by the mortgagee while in possession, cannot be maintained if filed more than ten years after the foreclosure, of which the mortgagor had knowledge during the whole of that period. *Tetrault* v. *Fournier*, 58.
6. It is not a sufficient excuse for the laches of the heirs at law of a mortgagor, in delaying for ten years to bring a suit in equity to redeem real estate from a foreclosure alleged to be voidable by reason of fraud and mismanagement by the mortgagee while in possession, that "the plaintiffs have been delayed in the bringing of this action by the negligence and misconduct of certain attorneys whom they have employed to protect their interests therein, but who have either done nothing or have so unskilfully managed the said action that the plaintiffs have wholly

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failed to secure the relief to which they are and were entitled; said attorneys being at no time able to respond in damages for their said negligence and misconduct." The foregoing allegation in a bill in equity otherwise bad for laches is too general to put on the defendants the burden of a trial. *Tetrault* v. *Fournier*, 58.

Defence of laches appearing on face of bill in equity can be set up by demurrer, see EQUITY PLEADING AND PRACTICE, 3.

In suit to reform mistake in instrument in writing, no laches if bill filed within reasonable time after learning of mistake, see *post*, 9.

Where mortgagee takes possession of real estate under attempted foreclosure by void sale, mortgagor may bring bill to redeem at any time within twenty years, see MORTGAGE, 3.

Ignorance and Mistake.

7. Ignorance of the law is no more an excuse in equity than at law for failing to assert a right within the time limited by statute. *Shelton* v. *Sears*, 455.

8. A mistake as to the ownership of land is a mistake of fact in regard to which equity will grant relief, although the mistake arose from an erroneous view of the legal effect of a deed. *Livingstone* v. *Murphy*, 315.

9. In a suit in equity to reform an instrument in writing which owing to a mistake of fact fails to express the alleged intention of the parties, the plaintiff is not chargeable with laches on account of a lapse of time after the execution of the instrument if he files his bill within a reasonable time after becoming aware of the mistake. *Ibid.*

10. Where a husband and wife to secure their joint note agree to give a mortgage covering the entire interest of both of them in a certain lot of land, but by a mistake of fact the land is believed by all the parties to belong to the wife, whereas it belongs to the husband, and a mortgage accordingly is executed by the wife the husband joining only to release his right of curtesy, the mortgage incorrectly describing the note as that of the wife alone, the mortgagee can maintain a bill in equity against the husband and wife to compel them to execute a new mortgage conveying the entire title of each of them, and such new mortgage will be good against all parties who took after the imperfect mortgage was given with notice of its infirmity. In such a case the record of the mortgage given by the wife with the release of curtesy by the husband gives no notice of the agreement of the husband which is an essential part of the equitable claim of the mortgagee. *Ibid.*

Redemption from tax sale where owner thought taxes paid, and was ignorant of sale, see TAX, 3.

Specific Performance.

In suit to enforce performance of agreement of defendant to sell land to plaintiff for certain price per acre plaintiff need not prove tender of purchase money but proof of readiness and willingness to perform is sufficient, and request by plaintiff that defendant survey land does not excuse his refusal to convey, see CONTRACT, 16.

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To enforce Contract of Indemnity.

11. Equity will not enforce a contract of indemnity where the party seeking to enforce it has not performed an act which by the terms of the contract is made a condition precedent to the indemnifier's liability. *O'Connell* v. *New York, New Haven, & Hartford Railroad*, 272.

To enforce Liability of Stockholder in Foreign Corporation.

12. A bill in equity cannot be maintained to enforce the statutory liability of a stockholder in a corporation organized in another State, upon a claim not yet reduced to a judgment, without making the corporation, or its assignee, and all the stockholders parties to the suit. *Clark* v. *Knowles*, 35.

13. Whether a creditor of a corporation organized under the laws of another State, in a suit in that State to enforce the statutory liability of stockholders, can obtain a decree against non-resident stockholders upon whom no service has been made, establishing everything that need be established in the home of the corporation, so far as to furnish a foundation for a subsequent suit against such stockholders in this Commonwealth, *quære*. *Clark* v. *Knowles*, 35.

14. In a suit in this Commonwealth to enforce the statutory liability of a stockholder in a corporation organized in another State, the decisions of the highest court of that State as to the meaning of the substantive provisions of the statute creating the liability must be followed, but the mode of procedure and practice in giving the remedies provided by the statute depend upon the law of this Commonwealth where the relief is sought, and a decision of the other State that neither the corporation nor its assignee is a necessary party to such a suit would not be binding on this court. *Ibid.*

To redeem Chose in Action.

15. It is no defence to a bill in equity by a third mortgagee of land who has filed a petition under St. 1894, c. 548, § 8, for damages from the construction and operation of the railway of the Boston Elevated Railway Company, seeking to compel the first mortgagees of the same property to enforce payment of their debts out of the land before resorting to the damages from the railway company, and offering to redeem from the first mortgages, that before the filing of the bill the land was sold subject to the first mortgages under the foreclosure of a second mortgage, the plaintiff being present at the sale and declining to bid. Such a sale does not deprive the plaintiff of his right to redeem the chose in action. *Bates* v. *Boston Elevated Railway*, 328.

As to apportionment of mortgagees' claims on land and on fund received for damage to land in suit by third mortgagee to redeem fund from first mortgages, see *post*, 17, 18.

To redeem Real Estate from Mortgage.

Attaching creditor in suit to redeem attached real estate from mortgage not bound by oral agreement of mortgagor of which he had no notice, see MORTGAGE, 4.

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Injunction.

Quære whether court may order party to pay damages for violation of injunction, see CONTEMPT, 2.

Service of, on parties to contract, as defence for failure to complete, see CONTRACT, 14.

Suit by Member to restrain Corporation.

16. If a bill in equity by a member of a corporation, to restrain the corporation from doing certain acts, does not allege that the plaintiff sought redress from the corporation itself or its officers before resorting to the courts, but the bill is not demurred to, and a master subsequently finds that if such an application had been made it would have been unavailing, the bill will not be dismissed on this ground. *Enos* v. *Church of St. John the Baptist*, 40.

To cancel Bond void for Fraud.

Court may order cancellation of bond to dissolve mechanic's lien, approval of which was obtained by fraud, see MECHANIC'S LIEN, 2.

Subrogation.

17. In a suit in equity by the holder of a third mortgage who has filed a petition for damages to his interest under a statute giving the right to such damages for injuries caused by the construction and operation of an elevated railway, against the holder of an underlying first mortgage to whom the entire damages assessed for the injury to the property have been paid, to compel him to collect his debt from the land instead of resorting to the damages, and seeking to redeem the claim for damages, if the plaintiff pays the first mortgage debt he is entitled to be subrogated to the rights of the first mortgagee both as to the land and the damages. If before the filing of the bill the land has been sold subject to the first mortgage under the foreclosure of a second mortgage, the plaintiff as against the purchaser of the land at the foreclosure sale can set up the lien of the first mortgage for such proportion of the first mortgage debt as the value of the land bears to the value of the fund received as damages. *Bates* v. *Boston Elevated Railway*, 328.

Marshalling of Liens.

18. A bill in equity by a third mortgagee of land, who has filed a petition under St. 1894, c. 548, § 8, for damages from the construction and operation of the railway of the Boston Elevated Railway Company, to redeem the claim against the railway company from underlying first mortgages, is not defeated by the entry of judgments in the Superior Court, after the filing of the bill, upon petitions of the first mortgagees giving them the entire damages assessed, or by the payment of these judgments, as under R. L. c. 48, § 114, and R. L. c. 111, §§ 112, 113, the court of law must assess entire damages and give judgment to each mortgagee in the order of his mortgage to the amount unpaid thereon, and has no jurisdiction to inquire into or adjust equitable rights, and the first mortgagees hold the payments received from the railway company subject to the plaintiff's right to

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have the burden of the first mortgage debts equitably apportioned between the land and the fund received as damages. *Bates* v. *Boston Elevated Railway*, 328.

Conspiracy.

As to suit in equity against parties conspiring together to sell proprietary medicine at retail below price at which one of them had agreed with plaintiff he would sell it, see CONSPIRACY, 2.

Landowner has no right to restrain building of wooden wall on adjoining lot in violation of city ordinance, see NUISANCE.

Remedy of property owner damaged by trestle constructed under St. 1903, c. 163, is under that statute and not by bill in equity, see CONSTITUTIONAL LAW, 8.

Where trustee pledges trust property without authority to one having notice of trust, pledgee has no title to property pledged and no remedy in equity against trust estate, see PLEDGE, 2.

Quære, as to power of court to interfere with disposition of bail money deposited on recognizance of prisoner, see RECOGNIZANCE, 2, 3.

Plaintiff who is in contempt of court cannot go on with suit as matter of right, see CONTEMPT, 1.

EQUITY PLEADING AND PRACTICE.

Certainty of Averments in Bill.

1. In a bill in equity to reach and apply property, alleged to have been conveyed fraudulently by the defendant, in payment of a debt to the plaintiff for rent and for loss of rent under a covenant in a lease to pay for such loss if the premises remain unleased during the remainder of the term after the lessor has terminated the lease for breach of covenant, an averment that the defendant owes the plaintiff a sum named for accrued instalments of rent and loss of rent according to an account annexed, which contains a charge of an item on the first day of each month with the words "instalment due under lease", naming the amount of the monthly rent, is not bad for want of sufficient certainty in not naming the date of the termination of the lease and distinguishing the items for rent from those for loss of rent, if a master has found that the loss of rent from month to month was the same in amount as the rent itself before the termination of the lease, the date of the termination being a matter within the defendant's knowledge. *Woodbury* v. *Sparrell Print*, 426.

Certain allegation in bill that plaintiffs delayed through negligence of attorneys held on demurrer too general to excuse laches, see EQUITY JURISDICTION, 6.

Variance.

2. In a suit in equity founded on the covenants of a lease, there is no variance if a lease is admitted in evidence which corresponds with that alleged in the bill but in addition has written upon it a guaranty of payment of the rent signed by a third party and also an agreement signed by the

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plaintiff to put into the leased premises two skylights and a water closet and to supply water service from the city of Boston, if these have been found by a master to be additional instruments. *Woodbury* v. *Sparrell Print*, 426.

Demurrer.

3. Where laches appears on the face af a bill in equity that defence can be set up by demurrer. *Tetrault* v. *Fournier*, 58.

Parties.

In suit in equity to enforce statutory liability of stockholder in foreign corporation upon claim not reduced to judgment, corporation and all stockholders must be made parties notwithstanding contrary decision by court of State in which corporation was organized, see EQUITY JURISDICTION, 12, 14.

Master's Report.

4. A finding of fact by a master in a suit in equity, confirmed by an order of the court to which his report was made, will not be reversed unless the reported evidence clearly shows it to be wrong. In this case two deeds made by an aged woman and placed by her direction in the hands of one of her sons who was her confidential man of business, and who also was one of the grantees, were found by the master, on the facts as reported by him, to be void for want of delivery, and this finding, confirmed by the Superior Court, was not disturbed by this court. *Joslin* v. *Goddard*, 165.
5. Where the rule to a master directs him "to hear the parties and their evidence and report his findings of fact and law to the court," he is not bound to report the evidence, and if one of the parties wishes to compel him to do so, that party must move in court that the master be required to report the whole evidence or such part of it as is desired. Such a motion properly should be made before the hearing before the master is closed, and when made after the hearing has been closed and a draft of the master's report has been shown, such a motion by the losing party is not looked upon with favor. *Moore* v. *Dick*, 207.
6. Whether an exception to a master's report because the master did not make certain rulings can be considered by this court if the master's report does not show that any of the rulings were requested except so far as this can be inferred from the master's statement that objections were filed on the ground that the rulings were not made, *quære*. *Woodbury* v. *Sparrell Print*, 426.

ESTOPPEL.

Exception of prior mortgage from covenants of mortgage does not estop mortgagee from contesting validity of prior mortgage, see MORTGAGE, 1.

EVIDENCE.

Presumptions and Burden of Proof.

1. In an action against a city for injuries caused by the plaintiff slipping on a lump of ice frozen upon the deck of a ferryboat operated by the defend-

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ant, if it appears that the accident happened on the twenty-fifth of January and no evidence is introduced as to the actual temperature, it will be presumed to have been that of ordinary winter weather. *Rosen* v. *Boston*, 245.

2. The following instruction in regard to the presumption of the innocence of the defendants in a criminal case was held to be a correct statement of law: "The jury start with the presumption that the defendants are not guilty until the evidence satisfies you differently. But when the evidence . . . satisfies you beyond any reasonable doubt, the evidence introduced by the government and the evidence of the defendants, when you are satisfied on that evidence, that the defendants are guilty, then you should say so, otherwise you say the case is not proved and return a verdict of not guilty." *Commonwealth* v. *Clancy*, 191.

Common law of another State presumed to be same as that of Massachusetts, but no presumption as to its statutory law, see *post*, 14, 15.

Burden of proving notice to grantee under quitclaim deed of outstanding equities is on one alleging it, see DEED, 5.

Presumption of fact that loss from package transported by express occurred in hands of last of two successive carriers, see CARRIER.

Relevancy and Materiality.

3. In an action, by a son against the executor under his father's will, for wages alleged to have been promised and set aside for him by his father of $25 a month for eleven years and four months, in which the defence was that any services rendered by the plaintiff were not intended by him or by his father to create a pecuniary debt, it appeared, that the father left a widow and as his only son and heir the plaintiff, that the plaintiff was unmarried, that he went to work upon his father's farm with other laborers with the understanding that he was to work for his board, lodging, clothes and tobacco, that he had a little money of his own and from time to time his mother let him have small sums, that his father believing it to be unwise to let him have money declined to pay him any wages, although he paid some of the bills contracted by the plaintiff, and had said at different times that he had money saved up for him. *Held*, that evidence of the following kinds introduced by the defendant against the plaintiff's objection was admitted rightly: 1. Of facts relating to the property and circumstances of the plaintiff's father, including the provisions of his will, tending to show the nature of the contract between the plaintiff and his father. 2. Of the conduct of the plaintiff himself, having a bearing upon the weight of his own testimony. 3. Declarations of the plaintiff's father made in his lifetime to the defendant or to the father's sister, or contained in his will, which were competent under the provisions of R. L. c. 175, § 67. *Tripp* v. *Macomber*, 109.

Plaintiff's judgment as to chance to cross street, see *post*, 10.

Reasons for change of grade of street immaterial on petition for damages caused by it, see DAMAGES, 8.

Possibility of certain additional improvements through change of grade in highway for which betterments are assessable immaterial on petition for damages for change, see DAMAGES, 9.

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On question of reasonable time for deputy sheriff to remove attached goods, evidence is immaterial as to length of time necessary for experienced shipper to do so, see ATTACHMENT, 2.

Evidence of single instances of misconduct of horse admissible to show that its general character is vicious, see ANIMAL, 1.

To show defendant's knowledge of viciousness of his horse, evidence is admissible of specific instances of misconduct of horse and of its reputation and of fact that it was driven only in company with another horse and of conversation in defendant's presence referring to horse as runaway, see ANIMAL, 3.

In action for injury from slipping on factory floor it is immaterial that fellow workman of plaintiff was furnished means to prevent floor from becoming slippery, see NEGLIGENCE, 45.

Competency.

4. Evidence naturally relevant, which is incompetent by reason of a rule of law, such as a witness's opinion or his conclusion of fact, if it is admitted without objection becomes a part of the case and may be considered by the jury and by this court, and it does not matter that the trial judge has certified that if the evidence had been called to his attention he would have excluded it and that he did not consider it in making his ruling on the case. *Rapson* v. *Leighton*, 432.

5. At the trial of an indictment for uttering a forged promissory note, the defendant, who was the chief of police of a certain town, in order to discredit one R., the principal witness for the government, introduced evidence tending to show hostility of R. toward the defendant. The government then put in evidence to the effect that R. was trying to get possession of a hotel which had been leased to persons for whom the defendant was manager, and evidence that the defendant said that he wanted R. to take possession of the property and run it, and that "he need not be afraid of being arrested for illegal sales of intoxicating liquors." The jury were instructed that the evidence was admissible only to show an attempt on the part of the defendant to conciliate R. *Held*, that the evidence was admissible for the purpose to which it was limited by the instruction. *Commonwealth* v. *Oakes*, 90.

Entries on books of town treasurer showing receipt of rent for land, leases of the land made by selectmen, and votes of town authorizing leases and asserting ownership are evidence of adverse possession of land by town, see ADVERSE POSSESSION, 4.

Indenture executed by town adjusting boundary and containing copy of vote of town, evidence of possession by town of certain land and of authority of selectmen to deal with that land, see ADVERSE POSSESSION, 5.

Amount of business immediately after its sale admissible to show that representations as to amount before its sale were false, see LARCENY, 3.

Evidence of directions of station agent to consignees of freight as to unloading competent to show that plaintiff's method of unloading was as directed and according to course of business, see *post*, 17.

Evidence of method of delivery of wheat in Chicago board of trade held

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competent on question of plaintiff's readiness and willingness to perform transaction alleged by defendant to be wagering contract, see WAGERING CONTRACTS, 3.

Best and Secondary.

6. Convictions of crime properly can be shown by docket entries if the records have not been extended. *Manning* v. *Boston Elevated Railway*, 496.
7. In an action to recover the consideration paid under an oral contract, unenforceable by reason of the defendant having set up the statute of frauds when sued on it, the plaintiff can introduce in evidence the writ and pleadings in an action brought by him upon the oral contract to show that the defendant in that action set up the defence of the statute. The pleadings themselves until the record is extended constitute the only record of the case. *DeMontague* v. *Bacharach*, 128.

Circumstantial.

8. In an action of tort for personal injuries alleged to have been caused by the negligence of the defendant, if the plaintiff introduces evidence from which negligence of the defendant may be inferred he need not point out the particular act or omission which caused the accident. *Gregory* v. *American Thread Co.* 239.

Collateral Issues: Remoteness.

9. In an action by an employee in a factory against her employer for having her hand caught and injured by a machine which she was operating starting of itself after she had stopped it, it is within the discretion of the presiding judge, to exclude as too remote evidence offered by the plaintiff to show that about eleven weeks before the accident the person offered as a witness was working on the same machine when it started of itself after being stopped and that the attention of the superintendent was called to the matter and the machine was taken to pieces and an attempt made to repair it. *Gregory* v. *American Thread Co.* 239.

On issue of injury to real estate evidence of price paid for property before and after injury and of rental before purchase by plaintiff held admissible, see *post*, 13.

Opinion: Experts.

10. In an action for personal injuries from being run into by the defendant's horse and sleigh when crossing a street, the plaintiff can be allowed to testify that he looked in both directions and could see no team approaching except the defendant's horse and sleigh and that he thought he had plenty of time to cross the street. Whitman *v.* Boston Elevated Railway, 181 Mass. 138, explained. *McCrohan* v. *Davison*, 466.
11. Upon the question of the reasonableness of a charge for medical attendance upon a smallpox patient at the attending physician's house in a city, it is within the discretion of the presiding judge to find disqualified as an expert one who has been an overseer of the poor and a member of the board of health of an adjoining town and who has on several occasions employed several physicians in the treatment and care of smallpox patients. *Lawrence* v. *Methuen*, 592.

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Questions to workman as to whether certain accident is possible in operating machine held competent as mode of describing parts of machine, see NEGLIGENCE, 41.

Of Value of Real Estate.

12. On the question of the depreciation of real estate owing to a change of grade, what evidence is admissible to show the market value of the property before and after the act affecting its value, depends largely on the circumstances of the particular case, and to a great extent must be left to the discretion of the presiding judge. *Peabody* v. *New York, New Haven, & Hartford Railroad*, 489.

13. In an action of tort for injury to the plaintiff's real estate by a change of grade in the street on which it is situated made by a railroad company as an approach to a new station without authority, evidence of the price paid by the plaintiff for the property somewhat more than a year after the change was known to be contemplated and less than two years before the work was begun and of the price at which the plaintiff sold the property within three years after the work was completed, and also of the sum for which the property had been rented about thirteen months before the plaintiff bought it, were held not to be so remote in point of time that there was error as matter of law in their admission to show deterioration of the plaintiff's property by reason of the acts of the defendant. *Peabody* v. *New York, New Haven, & Hartford Railroad*, 489.

Of Intent.

Undisclosed intention of claimant going upon land in possession of another, is immaterial, see ADVERSE POSSESSION, 6.

Of other Crimes to show Intent.

On indictment charging sale of business through false pretences where general conspiracy to cheat is shown evidence of other similar acts admissible to show guilty knowledge and intent, see LARCENY, 4.

Proof of Foreign Law.

14. In the absence of evidence as to the common law of another State it is presumed to be the same as that of this Commonwealth. *Callender, McAuslan & Troup Co.* v. *Flint*, 104.

15. In the absence of evidence as to the law of another State, the common law of such State is presumed to be the same as that of this Commonwealth, and as to the statutory law there is no presumption. *Cherry* v. *Sprague*, 113.

Extrinsic affecting Writings.

Oral evidence is admissible as to lost deed referred to in confirmatory deed, see DEED, 1.

Statements in alleged will as to its execution and attestation may be contradicted by oral evidence, see WILL, 2.

Where language of guaranty in writing is ambiguous, evidence of attendant circumstances and of preliminary correspondence is admissible to show intent of parties, see GUARANTY, 1.

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Admissions and Confessions.

16. In an action for injuries from the alleged negligent operation of an elevator in an apartment building owned by the defendant and let to various tenants, if the defendant denies that he was in control of the elevator at the time of the accident, the plaintiff for the purpose of proving such control may show that shortly before the accident the defendant procured a policy of indemnity insurance against loss or damage from accidents arising in operating the elevator, and that such insurance was in force when the plaintiff was injured. *Perkins* v. *Rice*, 28.

17. In an action against a railroad company for injury to the plaintiff's team while unloading goods from a car on a spur track of the defendant from being struck by a train run upon a side track near the spur track, statements made after the accident by the station agent of the defendant not in the performance of his duty as to the use of the spur track as a delivery track are not admissible against the defendant as admissions of liability, but evidence that the station agent told other consignees of freight or their servants to use the space between the spur track and the side track for the purpose of unloading goods from the cars is admissible, such statements being within the scope of the station agent's employment, and being competent to show that the method of unloading adopted by the plaintiff at the time of the accident was in accordance with the direction of the agent and the general course of business with others, and therefore should have been anticipated by the defendant. *Bachant* v. *Boston & Maine Railroad*, 392.

Declarations of Deceased Persons.

In action on alleged contract made by testator, his declarations as to contract, whether oral or contained in his will, are competent if coming within the requirements of R. L. 175, § 67, see *ante*, 3.

Book Entries.

18. In an action of contract by the proprietor of a hotel for the price of liquors and cigars, the plaintiff cannot put in evidence the entries in a book kept by a clerk in the office of the hotel made from slips brought to him by bell boys from the bar and the cigar department, the clerk having no personal knowledge of the sales and the original slips not being produced. *Gould* v. *Hartley*, 561.

Court Records and Pleadings.

Convictions shown by docket entries if records not extended, see *ante*, 6.

The setting up of the statute of frauds may be shown by the pleadings themselves in another case if the record has not been extended, see *ante*, 7.

EXECUTION.

Sheriff's deed to wife on sale on execution against husband is void, see HUSBAND AND WIFE, 1.

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EXECUTOR AND ADMINISTRATOR.

Powers.

1. Where a will plainly shows an intention of the testator that his real estate should be sold and the proceeds distributed in the settlement of his estate, the executor has power to sell real estate without an express statement to that effect. *May* v. *Brewster*, 524.
2. Where a will plainly shows an intention of the testator that his real estate should be sold and the proceeds distributed in the settlement of his estate, giving the executor by necessary implication the power to sell real estate, the power is attached to the office and not to the person and passes to an administrator with the will annexed. *Ibid.*

Acting as Trustee.

3. Where a will transfers the whole residue of the testator's property to the executors charged with a trust in regard to the management and disposition of it the executors necessarily take as trustees although the word "trustee" is not used. *Codman* v. *Brigham*, 309.

Discharge in bankruptcy of surety of administrator when bar to action against surety on administrator's bond, see BANKRUPTCY, 5.

When administrator of deceased principal in bond to dissolve mechanic's lien not necessary party in proceedings against sureties, see PRACTICE, CIVIL, 1.

FALSE PRETENCES.

On indictment charging sale of business through false pretences evidence is admissible of amount of business immediately after sale, see LARCENY, 3.

On indictment charging sale of business through false pretences where general conspiracy to cheat is shown evidence of other similar acts admissible to show guilty knowledge and intent, see LARCENY, 4.

FERRY.

Liability of city for injury to passenger slipping on ice on city ferryboat, see MUNICIPAL CORPORATIONS, 13.

Liability of city operating ferry as carrier for failure of employees to aid heavy team up steep incline from ferry to wharf with motor and blocks provided for purpose, see MUNICIPAL CORPORATIONS, 10–12.

FIXTURES.

Although an ice house built by a lessee of the land on which it stands may be made personal property by agreement, an ice house built by the owner of the land is real estate. *Roberts* v. *Lynn Ice Co.* 402.

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FORFEITURE.

Provision for forfeiture of policy of life insurance construed in favor of insured, see INSURANCE, 7.

Construction of certain clause for forfeiture of policy of life insurance, in view of provision making it paid up non-forfeiture policy after payment of certain instalments, see INSURANCE, 8.

FRAUD.

As to Creditors.

A conveyance fraudulent under St. 13 Eliz. c. 5, may be avoided as well by subsequent as by existing creditors. *Woodbury* v. *Sparrell Print*, 426.

Certain preference by father to sons upheld as good apart from statute, see EQUITY JURISDICTION, 4.

As to transfer by husband through third person to wife made in contemplation of his future debts and hazards of business, see BANKRUPTCY, 4.

On question whether wife of bankrupt converted to her own use property which he fraudulently placed in her name she may be asked where she deposited the money and how long afterwards she used it, see BANKRUPTCY, 3.

FRAUDS, STATUTE OF.

1. If the defence of the statute of frauds is not pleaded and is not relied upon at the trial it is waived. *Livingstone* v. *Murphy*, 315.

2. The statute of frauds is a bar to an action for a breach of an oral contract not to be performed within a year, although the contract partly has been performed before the breach. *DeMontague* v. *Bacharach*, 128.

Admissibility of pleadings in another action to show that defendant there set up statute as defence, see CONTRACT, 4; EVIDENCE, 7.

GOOD WILL.

For rights in good will of partnership on dissolution by death of partner, see PARTNERSHIP, 1–3.

GRADE CROSSING ACTS.

The requirement of the commissioners whose report was enacted as law by St. 1900, c. 472, providing for the abolition of certain grade crossings in Fall River, that the side walls of Central Street from Davol Street to Pond Street be raised by suitable masonry to a height of four feet above the grade of the street, was intended for the protection of travellers and not to cut off landowners from access to the street if they chose to construct passageways opening into it, and a ruling of an auditor that damages to adjoining land should be assessed as if the owners upon request were to have openings made, where reasonable, in the north wall on Central Street, for access to their property, is correct. *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 45.

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Mortgagor of real estate may recover damages under grade crossing act where mortgagee waives right to be heard, see DAMAGES, 1.
Damages to leased real estate taken under grade crossing act should be estimated on entire estate and apportioned among parties entitled, see DAMAGES, 4.
Under St. 1900, c. 472, as to grade crossings in Fall River, time of taking is date of filing of plan and recording of statement, see DAMAGES, 5, 6.
Right of owner of building abutting on street to recover for impairment of use of building during grade crossing changes, see DAMAGES, 3.
Right of owner of wooden building standing on land of which he is tenant at will to recover damages to building and estate at will from change of grade of street under St. 1900, c. 472, see DAMAGES, 2.

GUARANTY.

1. Where the language of a guaranty in writing is open to more than one construction, evidence of the circumstances under which it was given and of preliminary correspondence may be resorted to, to determine the intent of the parties. *Callender, McAuslan & Troup Co.* v. *Flint*, 104.
2. In an action on a guaranty in writing, it appeared, that the plaintiff, a wholesale dealer, at the request of S., a retail dealer in the same kind of goods, wrote to the defendant asking whether he would be responsible for the amount of a sale of goods to S., and that a correspondence ensued in which the defendant finally wrote as follows: "After talking with S. I have decided to help him in purchasing goods of you, he says, he can buy of you on sixty days. If so, I will guarantee the payment of goods he may buy of you, not to exceed $300, on terms as above." *Held*, that, considering the circumstances under which it was given and in the light of the correspondence, this was not a continuing guaranty, but was confined to the first sale of goods by the plaintiff to S. or to the first sales amounting to $300. *Ibid.*
Guaranty of payment for goods sold takes effect only when accepted and is to be construed by law of State where accepted, see CONFLICT OF LAWS, 2.

HAVERHILL.

Police Department.

So much of the charter of Haverhill, St. 1869, c. 61, as related to the police force, particularly § 12 of that chapter amended by St. 1887, c. 357, was repealed by implication by St. 1894, c. 480, which covered the whole subject of the police department of that city. *Smith* v. *Mayor of Haverhill*, 323.

HUSBAND AND WIFE.

1. A deed from a deputy sheriff to a wife made in pursuance of a sale on an execution against her husband is void. *Livingstone* v. *Murphy*, 315.
2. In an action by an alleged husband for damages incurred in consequence of personal injuries to his wife, the plaintiff must prove as a necessary

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part of his case that he is the husband of the person injured. *Tozier* v. *Haverhill & Amesbury Street Railway*, 179.

As to transfer by husband through third person to wife made in contemplation of his future debts and hazards of business, see BANKRUPTCY, 4.

Wife may bring action of tort for false representations which induced her to give up inchoate right of dower in husband's real estate, see DECEIT. 1, 2.

ICE AND SNOW.

As to injury of one under elevated structure from snow falling from above, see NEGLIGENCE, 4.

Liability of tenant holding under lease with certain covenants to one injured from falling on ice accumulated in front of building, see LANDLORD AND TENANT, 5.

Liability of city for injury to passenger slipping on ice on city ferryboat, see MUNICIPAL CORPORATIONS, 13.

Liability of city for injury from defect in highway with ice and snow upon it, see WAY, 7.

INFORMATION.

An information by the attorney general in the nature of a *quo warranto* is a proper proceeding to enforce the forfeiture of the charter of a domestic corporation under R. L. c. 73, § 8, by reason of its issuing obligations to be redeemed in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder, in violation of § 7 of the same chapter. *Attorney General* v. *Preferred Mercantile Co.* 516.

INSOLVENCY.

R. L. c. 147, §§ 21, 22, as to recording of assignments for creditors for purposes of insolvency proceedings, suspended by U. S. bankruptcy act of 1898, see BANKRUPTCY, 2.

INSURANCE.

Against Liability.

1. A policy insuring a stevedore against liability for accidents to his employees covers liability for an injury to an employee caused by a defect in a platform forming part of a coal run on a wharf belonging to a coal company which the stevedore has agreed to keep in repair under a contract to unload all the coal coming to the coal company at that wharf. *Cashman* v. *London Guarantee & Accident Co.* 188.

2. When a policy insuring against liability for bodily injuries caused by the negligence of the insured contains a provision, that no action shall lie for any loss under the policy unless brought by the insured "to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue," payment of the judgment by the insured is a condition precedent to liability of the insurance company. *Connolly* v. *Bolster*, 266.

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3. In a policy insuring against liability for bodily injuries to employees caused by the negligence of the insured, a provision that on notice of an action against the insured on account of an accident covered by the policy "the company will defend against such proceeding, in the name and on behalf of the assured," the word "defend" has its ordinary meaning and does not import an agreement to defend successfully, and if in spite of the defence judgment is given against the insured, the question whether the insurance company is bound to pay the amount of the judgment depends on the terms of its agreement to idemnify the insured against loss. *Connolly* v. *Bolster*, 266.

4. If a policy, insuring a contractor against liability for bodily injuries suffered by persons not employed by him caused by the negligence of the insured and resulting from the operation of his trade or business, contains a provision that no action shall lie against the company on the policy unless it shall be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue, there is no liability of the insurance company by reason of a judgment obtained against a third person in an action defended by the insurance company for bodily injuries caused by the negligence of the insured, if the judgment has been paid by the third person and the insured although he has given a bond of indemnity to the third person has not paid the amount of the judgment. *O'Connell* v. *New York, New Haven & Hartford Railroad*, 272.

5. Even if a company insuring against liability for bodily injuries caused by the negligence of the insured after taking upon itself the defence of an action for bodily injuries alleged thus to have been caused is precluded from asserting that the case is one not covered by the policy, it is not precluded from refusing to pay the insurance money before the insured has paid the judgment in the action for bodily injuries, if the policy makes this a condition precedent to liability. *Ibid.*

6. A provision in a policy against liability for bodily injuries caused by the negligence of the insured, that the insured shall not "settle any claim" without the consent in writing of the insurance company, does not refer to the payment by the insured of a judgment against him which by the terms of the policy is made a condition precedent to liability of the insurance company. *Connolly* v. *Bolster*, 266.

Life.

7. A provision for forfeiture in a policy of life insurance, being inserted for the benefit of the insurer, is not to be extended by implication, and if it is susceptible of more than one meaning that which is most favorable to the insured should be adopted. *Ferguson* v. *Union Mutual Life Ins. Co.* 8.

8. A policy of life insurance, declared in its first paragraph to be a "non-forfeiture" policy, contained a provision "that after two or more of said annual premiums have been fully paid, this policy becomes a paid up, non-forfeiture policy, for an amount equal to the sum of one tenth of that hereby insured for each and every premium which shall have been so paid; requiring no further payments of premiums." The policy also con-

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tained a provision and condition "that if the amount of any annual premium herein provided for is not fully paid, with the interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void, and wholly forfeited." *Held*, that properly construed these two provisions were not in conflict; that, after the payment of two premiums the right to paid up insurance became vested, and if from a failure to pay a subsequent premium the general policy lapsed, there would remain a paid up non-forfeiture policy for two tenths of the amount named, and so long as the annual premium continued to be paid, each year would add one tenth more to the amount of insurance secured. *Ferguson* v. *Union Mutual Life Ins. Co.* 8.

9. A married woman, after taking out a policy of life insurance for $500 on her own life, separated from her husband, and thereafter went through a form of marriage with one M. with whom she lived until her death, being known as his wife. M. paid weekly premiums on the policy, partly with money supplied by the insured and partly with his own money. After the death of the insured he paid her funeral expenses amounting to $158, and delivered to the company the usual proofs of death. The policy contained a provision, that the company might pay the sum insured "to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose." The company in good faith paid to M. the amount insured by the policy. In an action on the policy by the administrator of the estate of the insured, it was *held*, that the payment to M. discharged the obligation of the defendant under the policy and was a good defence to the action, and that it did not matter whether M. was equitably entitled to the payment if he appeared to the defendant to be equitably entitled to it within the stipulation of the policy. *Bradley* v. *Prudential Ins. Co.* 226.

INTEREST.

Interest by way of compensation for delay allowed as additional damages in tort for injury to real estate, see DAMAGES, 10.

INTOXICATING LIQUORS.

1. A sale of a quart of native wine cannot be found to be a sale at wholesale within the meaning of R. L. c. 100, § 1, permitting the sale of wine at wholesale by the original maker thereof at the place of manufacture and not to be drunk on the premises. *Commonwealth* v. *Poulin*, 568.
2. R. L. c. 100, § 49, regulating the transportation of intoxicating liquor to a city or town, in which licenses of the first five classes are not granted, by a railroad corporation or a person or corporation conducting a general express business, does not apply to or make illegal the transportation of intoxicating liquor to such a city or town by a natural person who is not conducting a general express business. *Commonwealth* v. *Beck*, 15.

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JOINT TORTFEASORS.

Semble, that a passenger in a train approaching a station, who is injured by an accident caused by the train coming in collision with a truck negligently left too near the track by the servant of a newsdealer, cannot sue the railroad company and the newsdealer as joint tortfeasors, even if both are negligent, their liability, if it exists, being several as differing in character. *Fletcher* v. *Boston & Maine Railroad*, 463.

JUDGMENT.

1. A decree of the Probate Court within its jurisdiction is good until set aside and cannot be attacked collaterally. *Tobin* v. *Larkin*, 279.
2. A judgment for the plaintiff in an action against a city for an alleged defect in a highway has no force or effect against a person who originally was joined as a defendant in the action and against whom it afterwards was discontinued, and the city after having paid the judgment cannot make use of it to recover the amount paid from the person who originally was a joint defendant. *Boston* v. *Brooks*, 286.

Necessity of filing of bond before vacating judgment under R. L. c. 193, § 15, see PRACTICE, CIVIL, 14.

Sale of real estate under decree of Probate Court is valid so long as decree remains unrevoked, notwithstanding knowledge of purchaser that third party has obtained decree in equity for conveyance to him of property sold, see PARTITION, 2.

JURY AND JURORS.

Criminal record of juror held to justify exercise of discretion by judge in granting new trial on ground that juror was disqualified as not of good moral character, see PRACTICE, CIVIL, 17.

Decision of trial judge after verdict that juror was disqualified is not subject to revision by this court, see PRACTICE, CIVIL, 16.

Certain facts held not to show neglect in failing to object to qualification of juror before trial, see PRACTICE, CIVIL, 18, 19.

LANDLORD AND TENANT.

What constitutes Relation.

1. An instrument in writing, by which a landowner lets to an ice company his ice business and privileges in a certain city "with the use and benefit of his ice houses" for a period named, is a lease of the ice houses and the land under them and not a mere contract for the use of the ice houses as licensee, and if the ice houses are destroyed by fire during the term the full rent none the less must be paid. *Roberts* v. *Lynn Ice Co.* 402.

Whether instrument is lease or license is question of law, see CONTRACT, 10.

Liability of Landlord to Tenant.

2. A landlord is not liable for an injury to a tenant from a fall caused by the giving way of a rotten railing of a piazza which the landlord has not agreed to repair and the tenant has not asked him to repair, although the landlord's agent in charge of repairs has noticed the railing two weeks

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before the accident and has found it weak and shaky and after making certain repairs including a new board in the floor of the piazza has assured the tenant that everything is safe and sound, and that she need not fear to use the piazza; and the fact that the agent at the request of the tenant has made the other repairs is immaterial. *Galvin* v. *Beals*, 250.

Liability of Landlord to Third Persons.

Procuring by landlord of indemnity insurance on account of elevator is evidence of his control of elevator, see EVIDENCE, 16.

Liability of Tenant to Landlord.

3. Where a lease of real estate, under which the rent is payable on the first day of every month during the term, gives the lessee the right to purchase the property during the term, and the lessee exercises the option and tenders the purchase money on the twenty-ninth day of a month, and refuses to pay rent after the first day of the month in which he has made the tender, the lessor may recover the proportional part of the rent under R. L. c. 129, § 8, the contingency of purchase by the lessee under the provision of the lease which has terminated the estate of the lessor being such a contingency as is provided for by the statute. *Withington* v. *Nichols*, 575.

4. The lessee of a building and the land on which it stands under a lease in writing must pay the full rent although the building is destroyed by fire during the term, unless the lease contains a provision to the contrary, but one who has the use of the premises as a licensee under a contract that he shall have such use for a specified time at an agreed compensation is not bound to pay for the use of the building after its destruction by fire. *Roberts* v. *Lynn Ice Co.* 402.

Under covenant in lease to pay for loss to lessor from termination of lease by lessee, where amount of loss cannot be ascertained until end of term, rights in covenant do not mature until that time, see EQUITY JURISDICTION, 3.

Liability of Tenant to Third Persons.

5. The tenant of the ground floor and basement of a building under a lease by which he has covenanted to save the lessor harmless from any claim or damage arising from neglect in not removing snow and ice from the roof of the building and from the sidewalks bordering on the leased premises, the upper stories of the building being let to another tenant under a lease containing a similar covenant, has control of the sidewalks adjoining the building, and is liable to a person injured from falling on an accumulation of ice in front of the building caused by the discharge of water from a spout conducting the water from the roof of the building and that of another building adjoining it. *Wixon* v. *Bruce*, 232.

Tenant of building, in which landlord has exclusive control of heating apparatus, not liable to employee for injury from fall of pail attached to steam pipe by head plumber of landlord, see NEGLIGENCE, 37.

Guaranty of payment of rent and certain other agreements indorsed on lease held to be instruments additional to it, see EQUITY PLEADING AND PRACTICE, 2.

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Ice house built by lessee may be personal property, but if built by owner of land is real estate, see FIXTURES.

Tenant at will may recover for damage to estate from change of grade of street under grade crossing act, see DAMAGES, 2.

Occupation of tenant under lease of land, which he physically occupies in part, for purpose of establishing adverse possession of his landlord through him, extends to whole premises described in lease, see ADVERSE POSSESSION, 1.

Money due to railroad company as lessee operating railroad of another company under lease reached by trustee process, see TRUSTEE PROCESS, 3.

Mortgaged rolling stock leased to defendant cannot be reached by trustee process or other attachment, see TRUSTEE PROCESS, 4, 5.

LARCENY.

Indictment.

1. An indictment alleging that the defendant did feloniously "steal, take and carry away" money of a certain person to an amount named charges the crime of larceny with technical precision. *Commonwealth* v. *McDonald*, 581.

By Embezzlement.

2. Since the enactment of St. 1899, c. 316, (R. L. c. 208, § 26,) in charging the crime of larceny committed by embezzlement it has been unnecessary to state the fiduciary relation existing between the defendant and the person entitled to the property embezzled, or to allege that the defendant to whom it had been intrusted converted it to his own use. See St. 1899, c. 409, § 12, (R. L. c. 218, § 38.) *Commonwealth* v. *McDonald*, 581.

Allegation that money embezzled belonged to certain person supported by proof of special property in him, see PLEADING, CRIMINAL.

By False Pretences.

3. At the trial of an indictment for larceny, consisting of the alleged fraudulent sale of a business at an amount grossly in excess of its value by means of false pretences, evidence, that the sales of goods after the transfer of the business immediately were much less than they had been represented to be, is admissible to show that the representations as to the amount of the business before the transfer were false, as it is not to be expected that an established business will diminish seriously at once without some good reason. *Commonwealth* v. *Clancy*, 191.

4. At the trial of an indictment of two defendants for larceny, consisting of the alleged fraudulent sale of a business to a certain person at an amount grossly in excess of its value by means of false pretences, if the evidence discloses a general conspiracy between the two defendants to cheat whomever they could by selling out a pretended business for cash by means of false representations, evidence of the acts of either or both of the defendants in deceiving other persons in a similar manner is admissible to show the knowledge of each of the defendants of the falsity of the

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representations made and of the intention of each to cheat by means of such representations. *Commonwealth* v. *Clancy*, 191.

LAW OF THE ROAD.

Where one driving automobile chooses narrower opening at right of trench in road rather than wider opening on left and is injured, law of the road is to be considered, see WAY, 10.

LICENSE.

One who enters a private way for the purpose of passing through it to his place of business and is called by an abutter on the way into the abutter's place of business and after remaining there a short time enters again upon the way for the purpose of proceeding to his own place of business is a mere licensee, and, if he falls into a hole in the way filled with hot water, he cannot hold the proprietors of the way liable for want of ordinary care. *Weldon* v. *Prescott*, 415.

Whether instrument is lease or license is question of law, see CONTRACT, 10.

Certain instrument letting ice business with "use and benefit" of ice houses, held to be lease and not license, see LANDLORD AND TENANT, 1.

Licensee under contract for use of building for specified time not bound to pay for such use after its destruction, see LANDLORD AND TENANT, 4.

LIMITATIONS, STATUTE OF.

Ignorance of law no excuse in equity for failure to assert right within time limited, see EQUITY JURISDICTION, 7.

LIS PENDENS.

Knowledge of purchaser of land sold at partition sale that third party has obtained decree for conveyance to him of interests included in sale does not invalidate sale, see PARTITION, 2.

LOTTERY.

The issuing by a corporation of obligations with an element of chance in their redemption, arising from uncertainty as to the number of persons holding similar obligations who will allow them to lapse and uncertainty as to the number of persons who will take new obligations and make payments thereon, is not punishable as a lottery under R. L. c. 214, § 7. *Attorney General* v. *Preferred Mercantile Co.* 516.

MANDAMUS.

Not granted to compel Superior Court to proceed with suit where plaintiff is in contempt, see CONTEMPT, 1.

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MARRIAGE.

A ceremony of marriage in this Commonwealth between persons against one of whom a divorce has been granted within two years under Pub. Sts. c. 146, § 22, is invalid, and such a marriage only can be shown to have become valid under R. L. c. 151, § 6, by the parties to it living together as husband and wife after the removal of the impediment, by proving that the illegal marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, and that they continued to live together in good faith on the part of one of them. *Tozier* v. *Haverhill & Amesbury Street Railway*, 179.

In action by alleged husband on account of personal injuries to wife plaintiff must prove that he is husband of person injured, see HUSBAND AND WIFE, 2.

MARSHALLING.

As to bill by third mortgagee, to compel first mortgagees to satisfy debts out of property before resorting to claim for damages to property, see EQUITY JURISDICTION, 15, 17, 18.

MASTER AND SERVANT.

1. In an action against the members of a firm engaged in a general teaming business for injuries received from being struck by a team of the defendants when the driver was intoxicated and driving negligently, if it appears that when the plaintiff was struck the team was going toward the defendants' stables at about eleven o'clock in the morning, that it was the practice of the defendants not to have their teams return to the stables in the middle of the day and to have the horses fed from pails at their stand, but that the driver of this team had done all the work assigned to him on that day, that an unusually heavy rain was falling, and that on a few occasions in extreme weather the defendants' teams had been sent to the stables, it can be found that the driver was acting within the scope of his employment at the time of the plaintiff's injury. *Brough* v. *Towle*, 590.
2. If a baker employing a large number of men tells the driver of one of his wagons that in his absence he can ask his brothers for any further instructions as to conducting the business that may be necessary, and in consequence of this direction the driver asks one of the baker's brothers about an assistant to aid on the team in the delivery of goods to take the place of a boy then absent, and says that he probably can get a boy, to which the baker's brother replies "all right," and if the driver previously has told the baker himself that he probably could get a certain boy named, to which the baker replied "all right," and thereupon the driver asks the boy whom he has named to the defendant to accompany him as an assistant and tells him that he will receive certain wages, and the boy complies, and is injured on the first day of his employment, it can be

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found that the boy was hired by the driver either with the knowledge and assent of the baker, or of his brother who had authority to act for him in his absence, and that the boy was the servant of the baker at the time of his injury. *Palmer* v. *Coyle*, 136.

3. In a contract, made by a contractor with the street railway company for laying a certain line of track, a provision, that the work shall be "subject to the direction and acceptance of the engineer" of the railway company, does not give the engineer any right of control or direction as to the execution of the work after indicating to the contractor what work is to be done and what materials are to be furnished, his only further right being to determine whether the work done by the contractor is acceptable, and the workman employed are servants of the contractor and not of the railway company. *Hooe* v. *Boston & Northern Street Railway*, 67.

MASTER IN CHANCERY.

Bond to dissolve mechanic's lien on which names of sureties are forged is invalid although approved by master in chancery, see MECHANIC'S LIEN, 4.

Court may order cancellation of bond to dissolve mechanic's lien approval of which by master in chancery was obtained by fraud, see MECHANIC'S LIEN, 2.

MECHANIC'S LIEN.

Sworn Statement.

1. If the sworn statement of a mechanic's lien is filed under R. L. c. 197, § 6, within thirty days after the petitioner has ceased to labor, and if the last items of labor were performed in good faith under the petitioner's contract, the lien is none the less valid because, before the work named in the last items was done, no work had been done by the petitioner for about thirty-four days and before the last work was done the houses on which the lien is claimed appeared to be completed and were purchased by their present owner without knowledge of any lien. *Whether* there might be an interval of delay so great and unreasonable as to justify the court in holding as matter of law that the lien had been lost was not considered, as in this case the delay was not unreasonable. *D. L. Billings Co.* v. *Brand*, 417.

Bond to dissolve.

2. This court has jurisdiction in equity to order the cancellation of a bond, fraudulently given to dissolve a mechanic's lien, the approval of which by a master in chancery under R. L. c. 197, § 28, has been procured by fraud and perjury. *Keyes* v. *Brackett*, 306.
3. The fact that a conveyance of real estate subject to a mechanic's lien is made to a person for the purpose of his giving a bond under R. L. c. 197, § 28, to dissolve the lien, although it may be important evidence of fraud, does not in itself affect the title of the grantee. *Breed* v. *Gardner*, 300.
4. A bond given under R. L. c. 197, § 28, to dissolve a mechanic's lien, bearing the signatures of sureties forged by persons falsely impersonating those whose names are signed, does not comply with the requirement of

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the statute of a bond with sureties, and has no effect to discharge the lien. The approval of the sureties by a master in chancery gives no validity to such a bond, as the approval is only of the qualifications and fitness of the persons whose names are signed, and it is not a part of the master's duty to pass upon the question whether the signatures are forged. *Breed* v. *Gardner*, 300.

When administrator of deceased principal in bond to dissolve mechanic's lien is not necessary party to proceedings against sureties, see PRACTICE, CIVIL, 1.

MISTAKE.

Redemption from tax sale where owner thought tax paid and was ignorant of sale, see TAX, 3.

Ignorance of law no excuse in equity for failure to assert right within time limited, see EQUITY JURISDICTION, 7.

Mistake as to ownership of land is mistake of fact although arising from mistake as to legal effect of deed, see EQUITY JURISDICTION, 8.

MORTGAGE.

Of Real Estate.

Effect of exception of prior mortgage.

1. The exception from the covenants of a mortgage of a prior mortgage does not estop the mortgagee from contesting the validity of the prior mortgage as against the holder of it. *Livingstone* v. *Murphy*, 315.

Foreclosure.

2. An advertisement of a sale of real estate under a power of sale in a mortgage, which, instead of being published in a certain weekly newspaper named in the power of sale, is published in a daily newspaper of another name printed by the same proprietors and issued from the same office, is not published in compliance with the requirements of the power, and an attempted foreclosure sale in pursuance of such an advertisement is void. *Moore* v. *Dick*, 207.

Redemption.

3. Where a mortgagee of real estate has made an attempted foreclosure under a power of sale in the mortgage, which is void because the sale was not advertised in accordance with the terms of the power, and the mortgagee takes possession of the land and continues in possession in good faith supposing the sale to have been valid, the mortgagor, who never has been deprived of the legal title to the land, may maintain a bill in equity to redeem it from the mortgagee at any time within twenty years, and no delay on his part within the period of limitation can be accounted laches. *Ibid.*

4. The rule, that in equity a mortgagor of land cannot redeem by paying the original debt if by an oral agreement between the mortgagor and mortgagee the mortgage is to cover an additional advance of money made by the mortgagee, does not apply to a bill to redeem by an attaching creditor of the mortgagor who had no notice of the oral agreement. *Whitney* v. *Window Screen Manuf. Co.* 557.

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Mortgage (*continued*).

Bill to redeem filed ten years after foreclosure of which mortgagor had notice, is barred by laches, notwithstanding general allegation in bill of delay through negligence and misconduct of attorneys, see EQUITY JURISDICTION, 5, 6.

Bill by third mortgagee to redeem claim of damage to property from first mortgages not defeated by judgments on claim or payments thereunder to first mortgagees, see EQUITY JURISDICTION, 18.

Rights of third mortgagee in bill to redeem claim of damages to property from first mortgages, as affected by payment of first mortgage or foreclosure of second mortgage, see EQUITY JURISDICTION, 17.

Effect of foreclosure of second mortgage on bill by third mortgagee to redeem claim of damage to property from first mortgages, see EQUITY JURISDICTION, 15.

Right of mortgagee in mortgage given under mistake of fact as to ownership of land to compel execution of new mortgage, see EQUITY JURISDICTION, 10.

Bona fide purchaser of note obtained by fraud with its security takes clear title to mortgage and mortgage note held as security although mortgage note may not be negotiable, see BILLS AND NOTES, 11.

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

Landowner has no right to restrain building of wooden wall on adjoining lot in violation of city ordinance, see NUISANCE.

Orders and Votes.

1. Under the charter of the city of Cambridge, St. 1891, c. 364, as amended by St. 1896, c. 173, an order of the city council if approved by the mayor takes effect from the date of his approval. Thus in case of an assessment for betterments from the widening of a street, which under Pub. Sts. c. 51, § 1, (R. L. c. 50, § 1,) must be made within two years from the passage of the original order, the period of two years is to be computed from the approval of the order by the mayor. *Quinn* v. *Cambridge*, 507.
2. Where a vote of a city council ordering the construction of a certain bridge by the street commissioner under the direction of the mayor contains a statement of the estimated cost of the bridge, the amount named is to be treated as a mere expression of opinion and not as imposing a limit which cannot be exceeded in a contract for the construction of the bridge, and the street commissioner and the mayor using their discretionary power for the benefit of the city may accept a bid for the work somewhat in excess of the estimated cost. *Webb Granite & Construction Co.* v. *Worcester*, 385.
3. Whether an appropriation made by a city for "construction of streets" includes payment for land acquired by right of eminent domain over which the streets are laid out, *quære*. *Ibid.*

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Powers and Liabilities.

4. A town may let land for hotel purposes. *Murphy* v. *Commonwealth*, 361.
5. A city or town can acquire land for a purpose not public by adverse possession beyond the period of limitation. *Ibid.*
6. Where a town owns and maintains a stone quarry for the purpose of quarrying and crushing stone for use upon its public streets, incidental sales of broken stone for profit are not *ultra vires* but legitimate. *Duggan* v. *Peabody*, 349.
7. Where a town owns and maintains a stone quarry, quarrying and crushing stone there for use upon its public streets and from time to time making sales of broken stone and turning the proceeds into the town treasury, the town is liable to a person injured by a piece of stone thrown from a blast in the quarry due to the negligence of the superintendent of streets in charge of the work. *Ibid.*
8. Where a town owning and maintaining a stone quarry for the purpose of quarrying and crushing stone for use upon its public streets carries on for years in an open way the business of selling broken stone from the quarry, and this is annually referred to in the reports of the selectmen and the town treasurer made to the inhabitants at town meetings and presumably accepted, and the reports also are published and distributed among the inhabitants, this is sufficient evidence that the business of selling broken stone is conducted with the approval of the town and that the acts of its agents appearing in the reports have been ratified. *Ibid.*
9. Under the provision of the revised charter of the city of Worcester, St. 1893, c. 444, § 29, that "No sum appropriated for a specific purpose shall be expended for any other purpose, and no expenditure shall be made and no liability incurred by or on behalf of the city until the city council has duly voted an appropriation sufficient to meet such expenditure or liability, together with all prior unpaid liabilities which are payable therefrom," land damages awarded under a lay out of new streets for land of which possession has not been taken, although notice has been given of the time within which buildings must be removed, are not "unpaid liabilities" payable from the appropriation on hand which must be covered before new expenditures can be authorized. *Webb Granite & Construction Co.* v. *Worcester*, 385.

Liability as Carrier of Passengers.

10. A city operating a ferryboat as a carrier of passengers and their property for hire is liable for injuries to a passenger and his horse and wagon caused by the neglect of its agents or servants to make reasonable provision for the passage of teams from the ferryboat to the wharf at the place of landing, even if the negligence of a third person contributed to the injuries. *Townsend* v. *Boston*, 283.
11. A city operating a ferryboat as a carrier of passengers and their property for hire can be found liable for injuries to a passenger and his horse and wagon caused by a large wagon with a heavy load drawn by two horses sliding backward into the plaintiff's team down a drop one hundred and fifteen feet long leading up a steep incline to the wharf at the place

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of landing, if it appears, that there was a motor with a gearing in a large headhouse there which often was used to help heavy teams up the drop and was used after the accident to draw up the load which slid back, and if the superintendent of ferries testifies that it was the custom for deck hands to follow the teams and "chock" them, that is, to be ready to block them in case they should roll back or get stuck on the drop, and that blocks laid at the end of the boat were provided for that purpose, and if it also appears that the driver of the heavy team called out to one of the deck hands to "block" him as he started up the drop. *Townsend* v. *Boston*, 283.

12. Whether a passenger on a ferryboat is in the exercise of due care in starting with his horse and wagon up a steep drop leading to the landing place when a heavy team is two thirds or three quarters of the distance up the drop and more than fifty feet ahead of him, and he sees a deck hand standing there whose duty it is to "block" teams going up the drop and who has been asked by the driver of the heavy team ahead to "block" him and attempts to do so when it is too late, is a question of fact for the jury. *Ibid.*

13. In an action against a city, for injuries sustained while a passenger on one of a line of ferryboats operated by the defendant, caused in ordinary winter weather by the plaintiff slipping on a lump of ice about three inches long and an inch and a half wide, about as thick as a person's finger and in the middle a little higher, frozen to the deck so solidly that it could not be picked off by hand, in which it is admitted for the purposes of the case that the liability of the defendant is that of a carrier of passengers, the plaintiff on showing these facts has made out a *prima facie* case entitling him to go to the jury. *Rosen* v. *Boston*, 245.

14. In an action against a city for injuries sustained while a passenger on one of a line of ferryboats operated by the defendant, in which it is admitted for the purposes of the case that the liability of the defendant is that of a carrier of passengers, it is no defence that the plaintiff and her mother, the only witnesses, illiterate and ignorant women, do not know the name of the ferryboat on which the accident happened, and it is for the jury to say whether the inability of the witnesses to give the name of the boat proceeds from their ignorance or is evidence that the whole claim is a fraud. *Ibid.*

Officers and Agents.

15. *Semble*, that it is not within the ordinary authority of the superintendent of streets of a town as a public officer to purchase real estate to be paid for by the town and used as a stone quarry or to take charge of such a quarry belonging to the town and carry on the business of quarrying and crushing stone there, even for use upon the public streets. *Duggan* v. *Peabody*, 349.

Superintendent of streets agent of town in certain grading of streets, see WAY, 4.

Power of street commissioner of Worcester to make contracts under St. 1893, c. 444, § 40, see WORCESTER.

St. 1904, c. 314, § 1, as to removal of public officers, does not extend term of police officer employed for fixed time, see CIVIL SERVICE LAW.

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St. 1869, c. 61, relating to Haverhill police force, repealed by St. 1894, c. 480, covering whole subject of police department, see HAVERHILL.
Ratification by town of acts of agents, see *ante*, 8.

Water Rates.

16. In fixing the amount of water rates to be charged in a particular locality other things may be considered besides the amount of water used, and it may be reasonable and lawful to charge the inhabitants of an outlying section of a city as much for the water they use in only a part of the year as the inhabitants of the heart of the city are charged for the water used by them during the whole year. *Souther* v. *Gloucester*, 552.

Recovery of Expenses incurred for Persons infected with Smallpox.

17. St. 1902, c. 213, relating to the compensation of a city or town for expenses incurred for persons infected with smallpox having settlements in another city or town, which repealed R. L. c. 75, § 57, relating to the same subject, did not destroy or affect obligations existing under the repealed section. *Haverhill* v. *Marlborough*, 150.
18. The failure of a city to provide itself with a smallpox hospital does not prevent it from recovering in an action against another city under R. L. c. 75, § 57, for expenses incurred by its board of health for persons infected with smallpox having a settlement in the defendant city. *Ibid.*
19. In an action by one city against another, under R. L. c. 75, § 57, for expenses incurred by the plaintiff's board of health for persons infected with smallpox having a legal settlement in the defendant, if it appears that the persons in question were the only ones who fell ill in the house in which they were cared for, the plaintiff can recover the amount of a physician's reasonable bill, charging not only for his services required at the house but also for two weeks' quarantine thereafter, for which the plaintiff in its contract with the physician had agreed to pay. *Ibid.*
20. In an action by one city against another, under R. L. c. 75, § 57, for expenses incurred by the plaintiff's board of health for persons infected with smallpox having a legal settlement in the defendant, the plaintiff cannot recover expenses incurred for the services of policemen stationed to enforce the quarantine of the house in which the patients were isolated, or for supplies for other persons not ill who were quarantined in the same house, these expenses having been incurred not for the persons infected with smallpox but for the preservation of the public health. *Ibid.*
21. Whether under St. 1902, c. 213, § 1, a city or town, whose board of health has incurred expenses for persons infected with smallpox having settlements in another city or town can maintain an action for such expenses without first obtaining the approval of its bill by the board of health of the defendant city or town, *quære*. *Ibid.*

Adverse Possession.

On issue of title by adverse possession acts of town have same effect as similar acts of individual or private corporation, see ADVERSE POSSESSION, 2.
Entries on books of town treasurer, leases made by selectmen and occupa-

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tion and payment of rent thereunder, and votes of town authorizing leases and asserting ownership, as evidence of adverse possession of land by town, see ADVERSE POSSESSION, 4.

Indenture executed by town containing copy of vote of town evidence of possession by town of certain land and of authority of selectmen contained in vote to deal with that land, see ADVERSE POSSESSION, 5.

Filing of Petition with Selectmen.

Sufficiency of certain filing of petition for damages with selectmen, see DAMAGES, 7.

NEGLIGENCE.

Contributory Negligence and Due Care.

Of one driving upon farther of two street railway tracks behind car on nearer track, see *post*, 18.

Of person struck by team while crossing city street behind street car, see *post*, 24.

Of one driving across street railway struck by car coming rapidly around curve, see *post*, 21.

Of one driving covered wagon turning suddenly across street car tracks without looking or listening, see *post*, 19.

Of one driving noisy cart across railroad tracks at dangerous crossing without first stopping, see *post*, 10.

Of one crossing street seeing team approaching at distance by which he is struck when near curbstone to which he is crossing, see *post*, 23.

Of one driving automobile against rope stretched across right hand side of street from trench to sidewalk, see WAY, 11.

Due care of one driving automobile as affected by law of the road, see WAY, 10.

Of passenger standing upon step of car before train has stopped at station, see *post*, 11.

Of one pushing freight car struck by another car started down grade by high wind, see *post*, 6.

Of freight handler using brow improperly placed, connecting two cars, see *post*, 13.

Of delivery clerk stepping through hole in floor of freight car used as passageway in unloading freight, see *post*, 14.

Of passenger on city ferryboat driving horse and wagon up steep incline from ferry to wharf behind another team, see MUNICIPAL CORPORATIONS, 12.

Of employee in factory injured while operating defective machine which she had been assured had been put in order, see *post*, 42.

Right of one operating defective machine to rely on assurance of foreman that machine is all right, see *post*, 38.

Of workman moving heavy bar on insufficient truck, see *post*, 30.

Imputed.

1. An administrator can recover for the death of his intestate caused by the gross negligence of the servants of a street railway company, if the

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intestate at the time of the accident had intrusted himself to the care of the driver in a wagon by whose side he was sitting, and the driver was in the exercise of due care. *Evensen* v. *Lexington & Boston Street Railway*, 77.

Employer sitting beside negligent driver in wagon cannot recover on account of accident to which driver's negligence contributed, see *post*, 19.

Gross.

2. The gross negligence of an agent or servant causing the death of a person, which is necessary to make the principal or master liable under R. L. c. 171, § 2, is a degree of negligence materially greater than the mere lack of ordinary care. *Brennan* v. *Standard Oil Co.* 376.

3. In an action under R. L. c. 171, § 2, for causing the death of the plaintiff's intestate, a boy less than five years of age, it is no evidence of gross negligence on the part of the driver of a heavy wagon drawn by three horses abreast, that he drove at a trot down a slight grade on the right hand side of a street fifty feet wide including the sidewalks, when forty feet ahead the plaintiff's intestate was standing on or near the sidewalk with his back to the street and there was nothing to indicate that he would suddenly back or turn and go in front of the horses. *Ibid.*

Gross negligence of motorman in running electric car ten or twelve miles an hour across intersecting street in thickly settled part of town on dark night without sounding gong, see *post*, 17.

Whether plaintiff's intestate, killed by train while driving across grade crossing under certain circumstances, was grossly negligent held to be question for jury, see RAILROAD.

Proximate Cause.

Liability of city operating ferryboat as carrier for accident to which negligence of third person contributed, see MUNICIPAL CORPORATIONS, 10.

Negligence of superintendent in ordering gang of men to lift heavy, small machine is proximate cause of injury to workman who was jostled by other workmen and injured by closing of knife edges in machine, see *post*, 35.

Res ipsa Loquitur.

4. A person knocked down by the falling of a quantity of snow from above while he is walking under the elevated structure of a street railway company cannot hold the company liable for an injury thus caused if he cannot show where the snow came from and it is purely a matter of conjecture whether it came from the elevated structure. *McGee* v. *Boston Elevated Railway*, 569.

5. The mere fact that an open window of a railroad car falls on the fingers of a passenger when the train starts is no evidence of negligence on the part of the operating company. If it appears that the bolt of the window worked by a spring and there is no evidence of a defect in the window or its catch, the inference is that the accident was caused by the negligence of the person who opened the window in not raising it far enough for the bolt to catch completely. *Faulkner* v. *Boston & Maine Railroad*, 254.

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On Railroad.

6. One who is employed by a shipper to assist in putting merchandise into a freight car on a spur track of a railroad, and in pushing the freight car to the place of loading is struck and injured by another car started down a grade by a high wind, the grade not being noticeable and not known to him, can be found to be in the exercise of due care. *Pratt* v. *New York, New Haven, & Hartford Railroad*, 5.

7. To leave an empty freight car with the brakes not set at the top of a down grade on a spur track, on which it is the practice for shippers to move cars by hand, can be found to be negligence on the part of a railroad company, for which it is liable to the employee of a shipper who when pushing another car into the place for loading is struck by the car first mentioned started down the grade by a high wind; and in such a case it is no excuse for the railroad company that the car with the brakes not set was held in place on the grade by the car below it, which had its brakes set and which was moved by the employee of the shipper after loosening its brakes, because such a moving of the supporting car ought to have been foreseen. *Ibid.*

8. For a railroad company to give notice to a consignee that grain is ready for delivery, and to place the car loaded with the grain on a spur track where a team stationed to receive the grain will be struck by any train running upon a side track near the spur track, and then to run a train on the side track and injure the team of a person unloading the grain for the consignee is evidence of negligence on the part of the railroad company. *Bachant* v. *Boston & Maine Railroad*, 392.

9. Where a railroad has not provided a freight house for the storage of merchandise and consignees are expected to unload their goods directly from the cars after receiving notice that they are ready for delivery, it is the duty of the railroad company notifying a consignee of the arrival of goods to place the car containing them where it can be unloaded with safety and convenience, and a person coming with his team to unload the goods for the consignee, if shown the car by the station agent and told by him to "back up there; it is all right," is justified in relying upon this statement, and is not called upon to exercise constant observation to avoid injuries to his team from a train coming on a side track. *Ibid.*

10. An employee of a coal company, driving a pair of horses in an empty tip cart on his way for a load of coal on a private road used by the coal company's agents, servants and customers, about to cross the tracks of a railroad company at a crossing which he considers dangerous, knowing that a train may come along at any moment and that there is no gate or flagman there, his view in one direction being obstructed by a lumber shed and by a car on a spur track and his empty cart making considerable noise on the frozen ground although going slowly, is not in the exercise of due care if he drives upon the track and is struck by a train without first stopping to ascertain whether he can cross with safety. *Rogers* v. *Boston & Maine Railroad*, 217.

11. A passenger in a railroad train who, after the name of the station at which he is to alight has been called and while the train is moving slowly

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but has not stopped, leaves the car and stands upon the first of four steps leading from the side of the platform at the end of the car, and while there is thrown to the ground and injured, his fall being caused by the steps being bent under the platform of the car on coming in collision with a truck in charge of a servant of a newsdealer, is not in the exercise of due care and cannot recover either from the railroad company or the newsdealer, although one or both of them may have been negligent. *Fletcher* v. *Boston & Maine Railroad*, 463.

As to injury from falling of car window on passenger's fingers, see *ante*, 5.

Passenger on train injured by collision of train with newsdealer's truck cannot sue carrier and newsdealer jointly, see JOINT TORTFEASORS.

As to liability to freight handler loading car under direction of superintendent and injured by fall of brow improperly placed connecting two freight cars, see *post*, 13, and for similar cases, *post*, 12, 14.

Liability under R. L. c. 111, § 268, for loss of life caused by failure to give required signals at grade crossing, see RAILROAD.

In transferring Freight.

12. A railroad company is not liable to a workman employed in loading freight at its freight house into cars, who is injured when hauling a heavily loaded truck over a running board or skid serving as a bridge between two freight cars, from one end of the skid slipping off its support because not fastened by a cleat and causing the workman and his load to fall, if it is the custom to fasten the ends of the skids by nailing cleats across them and this is left to the workmen, who find hammers, nails and small pieces of wood for the purpose wherever they can, by going to different parts of the freight house or a short way outside of it. *Hayes* v. *New York, New Haven, & Hartford Railroad*, 182.

13. In an action, by a freight handler against the railroad company employing him, for injuries from falling between two freight cars standing side by side on parallel tracks, while working as one of a gang of five in transferring freight from one car to the other, it appeared, that the freight was to be wheeled in trucks over a wooden brow connecting a loaded car with the empty one to which the freight was to be transferred, that one end of the brow had iron hooks, with a cleat on the under edge, while the other end of the brow was bevelled so that the loaded trucks could be wheeled upon it without concussion, that by mistake the brow was placed wrong end to, so that, instead of the bevelled end, the end with the hooks rested on the car to be unloaded and the surface of the brow at that end was two inches or more above the floor of the car, that one of the men discovering this was about to reverse the brow when the superintendent in charge of the work said "the brow is all right, let it alone," that the plaintiff, who was not present when the brow was adjusted, was ordered by the superintendent with the other men of the gang to unload the car, that after two or three loads had been taken out by the other men, the plaintiff went upon the brow pulling a heavily loaded truck after him, when the brow fell, throwing the plaintiff with his load between the cars and causing the injuries. *Held*, that there was evidence of negligence on the part of the

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Negligence (*continued*).

superintendent, and of due care on the part of the plaintiff, and that the plaintiff by using the brow under the orders of the superintendent did not assume the risk of injury from its being placed improperly. *Murphy* v. *New York, New Haven, & Hartford Railroad*, 18.

14. In an action, by a delivery clerk in the freight house of a railroad company against his employer, for injuries from stepping through a hole in the floor of an empty freight car used as a passageway in unloading freight from another car and transporting it to the platform of the freight house, it appeared, that the method employed in unloading cars on the track second from the platform was to run the car opposite to a car on the first track, put a bridge between the two, connect the first car with the platform, and carry the freight on trucks across the bridge through the intervening car and over the second bridge to the freight house, that the empty car thus used as a passageway when the plaintiff was injured belonged to another railroad company, that the hole in its floor was partly covered by the rising board connecting the cars, and the plaintiff testified that, when he passed through the car pushing an empty truck before him on his way for the freight, his attention was directed to the rising board over which he was to pass rather than to any other portion of the way, and that he did not see the hole, into which he stepped and was injured. *Held*, that, irrespective of the manner in which the empty car got into the defendant's station, the defendant by taking and using it in unloading its own freight made it for the time a part of its ways, works or machinery within the meaning of the employers' liability act, for a defect in which it could be found to be liable. *Semble*, that the defendant also could be found to be liable at common law for furnishing the plaintiff with defective appliances with which to perform his work. *Held, also*, that the question whether the plaintiff was in the exercise of due care was one of fact for the jury. *Foster* v. *New York, New Haven, & Hartford Railroad*, 21.

On Street Railway.

15. Although it is true that in determining whether a person acts with reasonable care in a sudden emergency the fact that he is obliged to act quickly and without an opportunity for deliberation is to be taken into account, this does not absolve the motorman of an electric car when required to act in a sudden emergency from the obligation to exercise reasonable care under the circumstances. *Tozier* v. *Haverhill & Amesbury Street Railway*, 179.

16. A passenger in a car of a street railway company cannot recover from the company for injuries caused by a collision of the car with a team driven at night without lights at a pretty fairly lively gait on an unlighted street, crossing the car track from an intersecting street, from which the driver could have seen the car when it was one hundred feet or less away from the corner and when he himself was within five hundred feet of the corner, and where the car was not running at an excessive rate of speed, and the motor was reversed a second or so before the collision, apparently as soon as the team emerged from the darkness into the space lighted by the lights of the car, the only negligence shown being that of the driver of the team. *Black* v. *Boston Elevated Railway*, 172.

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17. It is evidence of gross negligence on the part of a motorman within the meaning of R. L. c. 111, § 267, upon which a street railway company may be found to be liable for causing the death of a person who is in the exercise of due care and is not a passenger or in the employ of such corporation, that on a dark night an electric car was run down a slight grade across an intersecting street in a thickly settled part of a town, where the view from one street to the other was at some points entirely cut off by houses and at others greatly obscured by overhanging trees, at a speed of from ten to twelve miles an hour without sounding any gong, that a traveller in a wagon was run over at the crossing and his body was found about seventy feet from the place of collision, where it evidently had been thrown or carried by the car, and that the car stopped about thirty-five or forty feet farther on. *Evensen* v. *Lexington & Boston Street Railway*, 77.

18. If one in driving approaches a double line of car tracks, where he knows that cars frequently are passing in both directions, and holds up his horse to allow a car to pass, and if immediately afterwards he drives upon the tracks without looking to see whether a car is coming from the opposite direction which he could not see or hear while the first car was passing, and is struck by such a car, he is negligent as a matter of law. *Saltman* v. *Boston Elevated Railway*, 243.

19. For one driving in a covered wagon with projecting sides cutting off the view except in front, after proceeding by the side of a street car track for three quarters of a mile, to turn suddenly across the tracks without looking or listening and with nothing to give assurance that a car is not near, going so slowly that considerable time must be taken in crossing the tracks, is negligence as matter of law, and a person thus driving whose team is struck by an electric car coming from behind at an excessive rate of speed cannot recover from the railway company for the injuries incurred. Nor can his employer sitting by his side. *Seele* v. *Boston & Northern Street Railway*, 248.

20. Whether one driving in a wagon at night, who, approaching a cross road on which electric cars run, listens and hears no gong or other sound indicating the approach of a car, his view of the cross road being at some points wholly obstructed by houses and as he comes near the track much obscured by overhanging trees, and drives upon the track where he is struck by a car, is in the exercise of due care, is a question of fact for the jury. *Evensen* v. *Lexington & Boston Street Railway*, 77.

21. If one driving on a quiet summer night in a heavy empty furniture wagon twenty-two or twenty-three feet long, with two horses going at a walk, is obliged on account of an obstruction on the right hand side of the street to cross the parallel tracks of a street railway to get to the left hand side of the street, and if there is a similar team ahead of him which crosses the tracks safely, and if, hearing no bell or other sound indicating the approach of a car, he starts diagonally across the tracks toward the left at an angle of forty-five degrees and, suddenly seeing a car coming rapidly around a curve on the farther track, strikes his horses "so as to clear it," because it is "too late to back up" and he has "to go ahead," and, if in attempting to do this his team is struck by the car and he sus-

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tains injuries, he can be found to be in the exercise of due care. *McCarthy* v. *Boston Elevated Railway*, 493.

On Elevated Railway.

22. It is no evidence of negligence on the part of an elevated railway company operating a train in a subway, that while the train was stopping at a station in the subway, where a curve of the track increased the space between the platforms of the cars on the outer side of the curve, a woman passing from one car to another, and not looking down to see the width of the space between the cars, fell and was injured by reason of one of her legs going down into the space as far as her knee, and that she saw no guard or other employee of the railway company on either of the car platforms before she fell. Whether on these facts the woman could have been found to be in the exercise of due care, *quære*. *Welch* v. *Boston Elevated Railway*, 118.

As to injury of one under elevated structure from snow falling from above, see *ante*, 4.

On Highway.

23. One crossing a street on an icy morning in winter who looks both ways and sees no team approaching except a horse and sleigh at a distance and, thinking that he has plenty of time to cross before the horse will reach him, walks on in his usual way without looking again at the horse and sleigh and when he is about a foot from the curbstone is struck by the sleigh and thrown down and injured, can be found to be in the exercise of due care. *McCrohan* v. *Davison*, 466.

24. A person attempting to cross a city street containing parallel tracks of a street railway and a structure supporting an elevated railway above them, who waits to let a surface car go by on the nearer track and then to let another surface car go by on the farther track, the last car stopping on or near the crossing, and then passes together with other persons who are crossing the street behind this car to get upon the sidewalk beyond, and is struck by a rapidly moving horse and wagon, in an action against the driver of this team may be found to have been in the exercise of due care. *Dorr* v. *Schenck*, 542.

Plaintiff's judgment as to chance to cross street, see EVIDENCE, 10.

See further, *post*, *In driving*.

In driving.

Negligence of one driving upon farther of two street railway tracks behind car on nearer track, see *ante*, 18.

Negligence of one driving covered wagon and turning suddenly across street car tracks without looking or listening, see *ante*, 19.

Due care of one driving across street railway struck by car coming rapidly around curve, see *ante*, 21.

As to collision at night between electric car and unlighted team crossing unlighted street, see *ante*, 16.

Due care of one driving at night across street railway tracks where his view is obstructed after listening for car is question for jury, see *ante*, 20.

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Where one driving automobile chooses narrower opening at right of trench in road over wider opening on left and is injured, law of the road is to be considered, see WAY, 10.

Whether plaintiff's intestate killed by train while driving across certain grade crossing under certain circumstances was grossly negligent held to be question for jury, see RAILROAD.

One driving in noisy cart across railroad tracks at dangerous crossing not in exercise of due care if he drives upon track without first stopping, see *ante*, 10.

Driving in heavy wagon at trot down grade on right hand side of street fifty feet wide towards plaintiff standing on sidewalk held no evidence of gross negligence, see *ante*, 3.

Administrator of one killed through gross negligence of railway company can recover where intestate was sitting in wagon under care of driver who was in exercise of due care, see *ante*, 1.

Negligence of driver in wagon imputed to his employer sitting by his side, see *ante*, 19.

On Ferryboat.

Liability of city as carrier for injury to passenger slipping on ice on city ferryboat, see MUNICIPAL CORPORATIONS, 13.

Negligence of passenger on ferryboat in driving up steep drop to landing place behind another team under certain circumstances is question for jury, see MUNICIPAL CORPORATIONS, 12.

Fact that ignorant plaintiff and her mother do not know name of ferryboat on which accident occurred is no defence to action for injury, see MUNICIPAL CORPORATIONS, 14.

City operating ferryboat as carrier liable for employees' failure to aid heavy team up steep incline from ferry to wharf with motor and blocks provided for purpose, even if negligence of third person contributed to accident, see MUNICIPAL CORPORATIONS, 10, 11.

In Factory.

As to injury from fall of factory floor, see *post*, 27.

As to injury from fall on factory floor, see *post*, 45.

Right of one operating defective machine to rely on assurance of foreman that machine is all right, see *post*, 38.

As to injury from machine starting of itself which had been defective and which person in charge of machinery reported had been put in order, see *post*, 42.

Defective Staging.

Negligence of superintendent in ordering plasterers to use unfit support for staging without inspection, see *post*, 31.

Negligence of mason's superintendent in failing to observe insecure support of staging used by workmen, see *post*, 33.

Employer's Liability.

Assumption of risk.

25. A workman by his contract of employment does not assume the risk of accidents caused by the negligence of the superintendent under whom he

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is working. *Murphy* v. *New York, New Haven, & Hartford Railroad*, 18; *Meagher* v. *Crawford Laundry Machinery Co.* 586.

26. If a workman, in crossing the end of a pit at the place of his employment instead of going around it, chooses to step upon a timber plainly inserted as a brace to hold a piece of machinery in place and not intended as a bridge, he does so at his own risk, and it does not matter how often the same risk has been taken by himself and others, including the superintendent in charge of the work. *Gillette* v. *General Electric Co.* 1.

27. In an action, by an experienced workman in a paper mill against his employer, for injuries from the falling of a floor of the mill across which the plaintiff was assisting in moving a heavy portion of a paper machine, called a cone pulley, it appeared, that the floor which fell was supported by cleats, and that the fastening of the cleat which gave way had become defective, the nails having been eaten away so that they did not hold, and that in the room below were tanks in which sizing was boiled, making steam which might cause the nails holding the cleats to rust and become weakened. The plaintiff testified that he knew nothing about this floor, and it did not appear that its manner of support was the usual construction of floors in the mill. *Held*, that upon this evidence a jury might find, that, even if there was no defect in the original construction of the floor, and even if the plaintiff had knowledge of the method of construction, the plaintiff had the right to assume that due care would be taken by his employer to see that the fastening of the cleat should be maintained at its original strength, and that the accident happened from the failure of the defendant to exercise such care; that the plaintiff did not assume the risk of such an accident, and, in estimating the strain to which the floor would be subjected by the movement of the heavy pulley over it, had the right to assume that due care had been used in maintaining the fastening of the cleat in proper condition. *Held, also*, that the defendant must be assumed to have known of the way in which the floor was constructed and that heavy articles were likely to be moved over it, and to have known the relative position of the sizing tanks and the cleat, and that the defendant, while it was under no obligation to the plaintiff to change the method of its floor construction, owed him the duty of using due care in seeing that the floor, including the fastening of the cleat, was kept in proper repair, it being a question for the jury whether upon the evidence the accident was attributable to a failure to use such care. *Thompson* v. *American Writing Paper Co.* 93.

Freight handler loading car does not assume risk of injury from fall of brow improperly placed connecting two freight cars, see *ante*, 13.

Right of one operating defective machine to rely on assurance of foreman that machine is all right, see *post*, 38.

Superintendence.

28. A section foreman of a railroad company, having charge of a gang of five men whose duty it is to transfer freight from one car to another, while the foreman selects the cars that are to be unloaded and checks the freight as it is transferred, can be found to be a person intrusted with superintendence over the five men within the meaning of the em-

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ployers' liability act. *Murphy* v. *New York, New Haven, & Hartford Railroad*, 18.

29. A workman, employed by a contractor for work involving blasting, who is called the powder man and charges with dynamite the holes drilled by other men and explodes the charges, is not a superintendent within the meaning of the employers' liability act while he is doing this work, although he sometimes assists the superintendent in inspecting the holes after a blast to ascertain whether any dynamite has failed to explode, which is a work of superintendence for the purpose of securing to the workmen a safe place in which to work. *Hooe* v. *Boston & Northern Street Railway*, 67.

30. If workmen are moving a heavy and long bar of iron over a rough uneven floor and are using for this purpose too small a truck which has wheels only at one end while in the building are four-wheeled trucks belonging to their employer suitable for moving such bars, and if after the truck has stuck so that the workmen cannot move it they are met by a superintendent who proceeds to take charge of moving the bar using the insufficient appliance adopted by the men instead of sending for a four-wheeled truck, and if the superintendent taking a piece of board as a lever tries to lift one of the wheels of the truck out of a depression in the floor and in so doing causes the truck to lurch and the bar to fall in such a way that one of the handles of the truck flies around and strikes and injures one of the workmen, the injured workman can recover from his employer for the injuries thus caused if the jury find that the superintendent was negligent and that the injured workman was in the exercise of due care. *Meagher* v. *Crawford Laundry Machinery Co.* 586.

31. If, while plasterers are preparing to erect a temporary staging to use in their work, a superintendent interferes and orders them for the purpose of supporting the temporary staging at one end to use a certain ledger board, which obviously is defective and unfit, but which the superintendent fails to inspect or to have inspected, and if the plasterers obeying the superintendent use the ledger board, and later another plasterer who did not assist in erecting the staging is injured by its giving way on account of the breaking of the defective ledger board, there is evidence on which the employer may be found to be liable to the plasterer for the injury caused by the negligence of the superintendent, although the same ledger board has been used for two weeks previous to the accident to support a temporary staging for carpenters and lathers without breaking. *Rapson* v. *Leighton*, 432.

32. If a superintendent in a factory says that he will go to the engine room and have the power shut off to stop the machinery so that a belt may be unwound from a shaft around which it has been drawn after coming off a pulley, and tells a workman to go upon a platform after the machine has stopped and unwind the belt, and if a few minutes later the machine stops and the workman goes upon the platform and begins to unwind the belt, when the machine almost instantly starts and catches the workman's arm, causing personal injury, this is evidence of negligence on the part of the superintendent for which the proprietor of the factory can be

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held liable to the workman. When a superintendent puts a workman in such a dangerous place it is his duty to look out for him and see that the machinery does not start. *Greenstein* v. *Chick*, 157.

33. It is the duty of the superintendent of a contracting mason, who as such superintendent has charge of the construction of a staging surrounding a large chimney in process of construction for the workmen to stand upon in laying bricks, the floor of which has to be raised from time to time as the work proceeds, not to allow the staging to be used at a height of twenty-five or thirty feet above the ground until he has used due diligence to see that it is constructed and secured properly, and if he fails to observe that a putlog supporting the floor of the staging does not rest on a ledger board but rests on an insecurely nailed stay in which there is a knot, and if a workman is injured by the falling of the staging as he goes upon it in carrying up a hod of bricks, the workman in an action against his employer may go to the jury upon the question of the negligence of the defendant's superintendent. *Solari* v. *Clark*, 229.

34. In an action by a carpenter against his employer for injuries alleged to have been caused by the negligence of the defendant's superintendent, it appeared, that the plaintiff was engaged with others, under the orders of a foreman in charge, in moving a heavy hard pine timber forty-two feet long, and that as the men were holding the timber for a minute and a half or more, a little longer than at other times, while a barrel beneath the timber was being rolled forward, the timber being too heavy for the men came down with them, injuring the plaintiff. Before this the men had said to each other, but not to the superintendent, that they had to exert more strength with this timber, and that there were not men enough. It appeared that fewer men were used in moving this timber than had been used in moving two similar timbers. On exceptions by the plaintiff after a verdict had been ordered for the defendant, the plaintiff disclaimed any complaint as to the number of men employed, but contended that he had a right to go to the jury on the ground that the superintendent was negligent in not ordering the men to lower the timber before it fell. *Held*, that in the absence of any evidence to show why the number of men was reduced, there was not sufficient evidence to warrant a finding that the superintendent ought to have known that the slightly longer strain to which the men were subjected was beyond their strength, especially in view of the plaintiff's express disclaimer of any complaint that too few men were employed, and that the verdict rightly was ordered for the defendant. *Bertholet* v. *J. W. Bishop Co.* 32.

35. In an action by an employee in the tack factory of the defendant for the loss of a finger through the alleged negligence of the defendant's superintendent, it appeared, that the plaintiff was called from his regular work to help in loading a rivet machine upon a wagon, that the machine weighed one thousand pounds and consisted of a pedestal four feet high with a balance wheel at the top, extending a foot and a half higher, and a cross piece, that the superintendent in charge of the loading knew the nature of the machine of which the plaintiff was ignorant, that when the balance wheel revolved two sharp edges were brought together, that at

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first the wheel was tied with a wire, but, while the men were attempting to place the machine on the wagon, it fell to the ground wrong side up, and the wire holding the wheel was broken, that the superintendent, without waiting to see whether the wheel still was tied, ordered a board put under the machine and then told six or eight men including the plaintiff to take hold and lift it into the wagon, directing as many as could to take hold of the board and the rest to get hold of the machine wherever they could, that there were more men than could get hold of the machine readily, that the plaintiff took hold of the board with his right hand and put his left hand on the end of the machine, that as the men lifted the machine to the wagon the plaintiff was crowded and lost his hold, and, when his left hand came clear, one of his fingers was gone, having been cut off by the two sharp edges brought together by the revolving of the balance wheel. *Held*, that there was evidence on which a jury might find that the superintendent was negligent in ordering the men to lift the machine without making sure that the balance wheel was tied, and that this negligence was the proximate cause of the plaintiff's injury. The jostling of the men and the consequent loosening of the plaintiff's hold was an incident to be expected in lifting so high, so heavy and yet so small a machine, and was not the sole cause of the accident. *Cunningham* v. *Atlas Tack Co.* 51.

As to negligence of superintendent directing men to work on brow improperly placed connecting two freight cars, see *ante*, 13.

Workman does not assume risk of accidents caused by negligence of superintendent, see *ante*, 25.

Duty to inspect.

36. It is the duty of one employing men in blasting rocks with dynamite to make such an inspection after every blast as is necessary to guard against an accident from an unexploded portion of the dynamite remaining in one of the holes drilled to receive it, and he is liable for an injury caused by his failure to make such an inspection, although neither he nor his superintendent knew or had reason to believe that there was an unexploded charge of dynamite in any of the holes. It is enough that the master and his superintendent knew or ought to have known of such a possibility or probability of some of the dynamite remaining unexploded as to make an inspection necessary for the safety of the workmen. *Hooe* v. *Boston & Northern Street Railway*, 67.

37. In an action, by a girl employed in a jewelry factory against her employer, for injuries from a pail of hot water which had been attached to a steam pipe at the top of the room falling on her head, it appeared, that the defendant did not own the building and had no control of the steam pipes, which as a part of the heating apparatus were under the exclusive control of the owner of the building, that the pail had been fastened to the pipe by the "head piper or plumber" of the owner of the building, to catch the drip from a leak in the pipe which he had attempted to repair, that the pail was plainly in sight, but the way in which it was attached to the pipe could not be seen from the floor, and there was nothing in the appearance of the pail to excite suspicion or to suggest that the

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plumber had not done his duty properly. *Held*, that there was no evidence of negligence on the part of the defendant toward the plaintiff in failing to inspect the fastening of the pail, as the defendant had a right to assume that due care would be used by those in charge of the pipes, and that the plaintiff's remedy, if any, was against the owner of the building. *Kirk* v. *Sturdy*, 87.

Ways, works or machinery.

38. If a workman in a factory is injured by a machine starting of itself after he has stopped it, through a defect which it was the duty of a foreman to remedy and of which the foreman had notice, and if the foreman on the day before the accident promised to repair the machine to prevent its starting in this way and assured the workman before he went to work on the day of the accident that the machine was all right, the workman has a right to rely on this assurance, and the employer is liable to the injured workman both at common law and under the employers' liability act. *Lynch* v. *M. T. Stevens & Sons Co.* 397.

39. An appliance does not become a part of the ways, works or machinery of an employer within the meaning of the employers' liability act until it becomes a part of the permanent structure or plant, and, if a workman is killed through the negligence of a fellow servant engaged in adjusting a new appliance to replace an old one which has been broken, his next of kin cannot recover from the employer for his death. *Nye* v. *Dutton*, 549.

40. It is evidence of negligence on the part of the proprietor of a cordage factory, that he has failed to replace a wooden box which usually covers a cog wheel gearing on a spinning frame but which has been removed because broken, and he may be held to be liable to a workman whose hand is injured by coming in contact with the cog wheel while moving a shipper fork to shift a belt in an ordinary way which would be perfectly safe if the box were in place. In such a case, if the workman has been called to this frame to take the place of a man temporarily absent and has no reason to suppose that any frame is without a box to cover the gearing, it cannot be said, as matter of law, that he is negligent in failing to discover the absence of the box or in taking hold of the fork to change the belt without looking carefully enough to notice that the box is gone, and the case is one to be presented to a jury. *Gomes* v. *New Bedford Cordage Co.* 124.

41. In an action, by a workman in a cordage factory against his employer, for the cutting off of three of the plaintiff's fingers by a cog wheel gearing on a spinning frame while the plaintiff was moving a shipper fork to shift a belt of the machine, alleged to have been caused by the absence of the wooden box which usually covered the gearing, a witness for the plaintiff was asked "Is it possible for your hand to come in contact with these gears when the cover is on?" and answered "No." Another witness was asked "Would it be possible for a person to get his hand caught in gears while moving the shipper fork if the cover was on the box?" and answered "No." He also was asked "If you were putting on the belt and supposing the cover were on the box could you get caught in the

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gears?" and again answered "No." The defendant objected to the evidence, on the ground that the witnesses were not experts, and also on the ground that their opinions were asked on a matter not the proper subject of expert testimony. *Held*, that, although the subject of the inquiry was not a matter for expert testimony, the evidence was competent, not for the purpose of introducing the opinions of the witnesses as such, but as a simple and convenient mode of describing the parts of the machine which were important for the consideration of the jury. *Gomes* v. *New Bedford Cordage Co.* 124.

42. In an action by a woman employed in a factory against her employer for having her hand caught and injured by a machine which she was operating starting of itself after she had stopped it, if it appears that the plaintiff had complained to the second hand in charge of the machines that the machine had stopped of itself and the man had replied that he would "have it fixed," and that the next morning the plaintiff complaining to the second hand that the machine was not running well, and asking him if he had fixed it, he replied "Yes, I have fixed the machine; that machine is all right"; and that afterwards, having pushed back the lever and brought the machine to a full stop, the plaintiff put her hand into the machine to find out whether it was working properly, when the machine started up and caught and injured her hand, there is evidence to go to the jury upon the questions, whether the plaintiff was in the exercise of due care, whether the second hand in charge, who was a person intrusted with the duty of seeing that the machinery was in proper condition within the meaning of R. L. c. 106, § 71, cl. 1, was negligent in not repairing the machine at all or in repairing it improperly, and whether the machine was defective, the fact that the machine started of itself being evidence upon the last two questions. *Gregory* v. *American Thread Co.* 239.

Floor of freight car belonging to third party used by railroad company as passageway between two cars in unloading freight is part of ways, works or machinery of company using it, see *ante*, 14.

Defective appliances.

43. In an action by a boy employed as an assistant on a baker's wagon against his employer, for an injury from being kicked by a horse of the defendant drawing the wagon when hit on the heels by the whiffletree upon the breaking of the breeching strap near a buckle, if it appears that the whiffletree would not have come in contact with the horse had not the breeching strap broken as it did and that the harness was an old one, there is evidence to go to the jury on the issue whether the harness was defective. *Palmer* v. *Coyle*, 136.

Duty of mill owner to see that factory floor is kept in proper repair, see *ante*, 27.

Fellow servant.

44. A workman in a rubber factory injured by falling when carrying an armful of rubber boots on his way to a chute, from slipping on a spot in a passageway of the factory where thin rubber cement has dripped in front of a tank, cannot recover from his employer for the injury, if it does not

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appear that the condition of the floor was due to any negligence on the part of his employer, and where, if it was due to the negligence of any one, it was that of one of his fellow servants. *McRea* v. *Hood Rubber Co.* 326.

45. In an action at common law and under the employers' liability act by a workman in a rubber factory against his employer for personal injuries from a fall caused by slipping on rubber cement alleged to have been allowed to remain on the floor of the factory through the defendant's negligence, evidence offered by the plaintiff, to show that a fellow workman of the plaintiff was furnished with sand and burlap to be used to prevent the floors becoming slippery from cement getting upon them, properly may be excluded as immaterial. *Ibid.*

Notice under Statute.

Signature to notice of injury under employers' liability act is sufficient if signed with name of plaintiff's attorney by attorney's stenographer to whom he dictated it, see EMPLOYERS' LIABILITY ACT.

Due Care in Emergency.

As to due care of one obliged to act quickly in sudden emergency, see *ante*, 15.

Shown by Circumstantial Evidence.

If plaintiff introduces evidence from which negligence of defendant may be inferred he need not point out particular act of negligence, see EVIDENCE, 8.

NEGOTIABLE INSTRUMENTS ACT.

Promissory note indorsed in blank by payee is payable to bearer, see BILLS AND NOTES, 7.

Maker of note wrongfully obtaining possession of it after indorsement in blank by payee is "bearer," within statute, see BILLS AND NOTES, 8.

Fact that bearer of note indorsed in blank is maker does not prevent bank discounting it from becoming holder in due course, see BILLS AND NOTES, 9.

Holder in due course of note payable to bearer can acquire title from thief, see BILLS AND NOTES, 10.

Under R. L. c. 73, § 33, note indorsed in blank by payee and stolen from him by maker is complete instrument, see BILLS AND NOTES, 2.

Under R. L. c. 73, § 141, *quære* whether holder of note payable "with interest" altered by insertion of words "seven per cent" must declare on note in original condition, see BILLS AND NOTES, 3.

NEW TRIAL.

See PRACTICE, CIVIL, 15–19.

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NUISANCE.

The owner of a house and lot on a city street cannot maintain a bill in equity against the owner of the adjoining lot to prevent his building the wooden wall of a house within three feet of the boundary line in violation of a city ordinance. *Hagerty* v. *McGovern*, 479.

Tenant, holding under lease with covenants to save lessor harmless from claims arising from neglect to remove snow and ice from sidewalks adjoining leased premises, liable to one injured from falling on ice accumulated in front of building, see LANDLORD AND TENANT, 5.

Proprietor of private way not liable for want of ordinary care causing mere licensee to fall into hole in way filled with hot water, see LICENSE.

NUMERICAL ORDER, OBLIGATIONS REDEEMABLE IN.

Obligations issued by a corporation, on which payments of one dollar each are to be made every week under penalty of forfeiture upon default for five successive weeks, which are redeemable each week in the order of their issue whenever an amount of money sufficient for that purpose is on hand received from ten cents set aside from every dollar paid on new obligations issued, are redeemable "in numerical order," even though numbered differently, and in an "arbitrary order of precedence without reference to the amount previously paid thereon by the holder," and their issuing is a violation of R. L. c. 73, §§ 7, 8. *Attorney General* v. *Preferred Mercantile Co.* 516.

R. L. c. 73, §§ 7, 8, forbidding issuing of obligations redeemable in numerical or arbitrary order is constitutional, see CONSTITUTIONAL LAW, 7.

OFFICER.

In determining validity of attachment, officer's return must be taken as true, see ATTACHMENT, 8.

As to rights of, in removing personal property attached, see ATTACHMENT, 1–3.

Certain return held to disclose valid attachment of personal property, see ATTACHMENT, 5.

ORDER.

If order payable out of first money payable to maker under contract with acceptor never becomes payable by its terms, fact that payment is made by acceptor to maker under new contract does not waive performance of conditions under first contract or make acceptor liable to payee of order, see CONTRACT, 15.

PARKS AND PARKWAYS.

1. Under St. 1893, c. 300, § 1, the Boston park commissioners lawfully could take as a parkway Commonwealth Avenue in that city, from

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Arlington Street, where it begins, to its intersection with Beacon Street, with the consent of the public authorities having control of that avenue and with the consent in writing of the owners of a majority of the frontage of the lots abutting thereon, to connect it with the public park or driveway under their control called the Back Bay Fens, although having no control over the Public Garden which abuts on Arlington Street. *Commonwealth* v. *Crowninshield*, 221.

2. Under St. 1875, c. 185, § 3, and St. 1893, c. 300, § 3, the Boston park commissioners have power to make rules for the use and government of the parkways under their control, and a rule made by them that "no person shall ride or drive in Commonwealth Avenue at a rate of speed exceeding eight miles an hour" is valid, being authorized by statute and reasonable. *Ibid.*
3. One who is controlling the motive power of an automobile may be said to be driving it within the meaning of a rule, made by a board of park commissioners, that no person shall "ride or drive" in a certain parkway at a rate of speed exceeding eight miles an hour. *Ibid.*
4. St. 1902, c. 315, § 1, regulating the speed of automobiles throughout the Commonwealth, repealed by St. 1903, c. 473, § 15, and superseded by § 8 of the same statute, did not abrogate any park regulations or deprive any park commissioners of powers conferred by previous statutes to regulate the speed of vehicles on parkways, referring only to public highways, streets and ways, and § 8 of the superseding statute referring only to public ways or private ways, excluding parkways. *Ibid.*
5. The provision of St. 1903, c. 473, § 14, that no special regulation as to the speed of automobiles "shall be effective unless notice of the same is posted conspicuously at the points where any road affected thereby joins other roads," applies only to regulations made by boards of aldermen of cities or the selectmen of towns, and has no application to rules made by park commissioners. *Ibid.*

PARTITION.

1. Whether the provision of R. L. c. 184, § 4, that a petition for partition shall set forth the rights and titles "of all persons interested who would be bound by the partition, stating whether they have an estate of inheritance, for life or for years, whether in possession, remainder or reversion, and whether vested or contingent," requires a petitioner who owns one twelfth of the real estate which is the subject of the petition to set forth the interest of one who has obtained a decree for the specific performance of a contract ordering the owners of the other eleven twelfths of the property to convey their shares to him, so that notice of the petition shall be given to the holder of such decree, *quære*. *Tobin* v. *Larkin*, 279.
2. Mere knowledge by a purchaser of land sold under a decree of partition in accordance with the provisions of R. L. c. 184, § 47, that a suit is pending in which the plaintiff has obtained a decree for the specific performance of a contract by the conveyance of the land to him by the owners in common other than the petitioner for partition, does not in-

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validate the partition sale so long as the decree of the Probate Court ordering it remains unrevoked, and if the holder of the decree in equity desires to set aside the sale on the ground that he had no notice of the partition proceedings, his remedy, if he has any, is to apply to the Probate Court for a revocation of the decree. *Tobin* v. *Larkin*, 279.

PARTNERSHIP.

Good Will.

1. On the dissolution of a partnership by the death of one of the partners the good will of the partnership business is a part of the assets of the partnership, and, in the absence of an agreement between the partners on the subject, the executor or administrator of a deceased partner has a right to have it sold in the liquidation of the assets of the partnership. *Hutchinson* v. *Nay*, 262.
2. In this Commonwealth, where a sale of partnership assets including the good will of the partnership has been forced upon a surviving partner by the administrator of a deceased partner, the surviving partner has the right to enter at once on a competing business and solicit trade from customers of the firm. *Ibid.*
3. Where the survivor of two partners in the teaming business after the death of his partner carries on the business in his own name at the old stand with only slight changes in the personnel of his customers for nearly two years, and then sells the good will of his business with a covenant to remain in the employ of the purchaser for six months and to do all in his power to hold the customers for the purchaser and with another covenant not to engage in the teaming business within the district covered by the old business for five years, he is under no obligation to account for the proceeds in even a nominal sum to the executor or administrator of his former partner, as the good will sold is his own and not that of the former partnership. *Ibid.*

PAUPER.

The provision of St. 1898, c. 425, § 2, (R. L. c. 80, § 6,) that "All persons absent from the Commonwealth of Massachusetts for ten years in succession shall lose their settlement" is not retroactive. *Lawrence* v. *Methuen*, 592.

As to recovery under R. L. c. 75, § 57, by one city from another of expenses incurred for persons infected with smallpox having settlement in defendant, see MUNICIPAL CORPORATIONS, 17–21.

PERPETUITY.

Gift by will to trustees of fund for hospital to be accumulated for twenty-five years is valid, see CHARITY, 1.

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PERSONAL PROPERTY.

Ice house built by lessee may be personal property but if built by owner of land is real estate, see FIXTURES.

Rails of street railway company laid on public street remain personal property, see STREET RAILWAY, 2.

PLEADING, CIVIL.

Declaration.

Joinder of counts.

1. A count by an administrator for causing the death of the plaintiff's intestate, a child, brought under R. L. c. 171, § 2, for the benefit of the next of kin of the deceased, cannot be joined with a count at common law for conscious suffering of the intestate before his death brought as legal representative of his estate. *Brennan* v. *Standard Oil Co.* 376.

Practice, where there are counts at common law and under employers' liability act, of leaving case to jury under statute only, without mentioning limit of damages and without ordering verdict for defendant on common law counts, see PRACTICE, CIVIL, 10.

Joinder of defendants.

That defendants cannot be sued jointly where liability differs in character, see JOINT TORTFEASORS.

On altered promissory note.

Under R. L. c. 73, § 141, *quære* whether holder of note payable "with interest" altered by insertion of words "seven per cent" must declare on note in original condition in order to recover interest at six per cent, see BILLS AND NOTES, 3.

Answer.

Answer to information in nature of *quo warranto* not necessarily to be taken as true, see QUO WARRANTO.

Presumption of truth of statements made upon information and belief in answer of trustee in trustee process, see TRUSTEE PROCESS, 1.

Defences.

In real action equitable defence must be set up by alleging facts as provided in R. L. c. 173, § 28, see REAL ACTION, 3.

Defence of statute of frauds is waived if not pleaded and not relied on at trial, see FRAUDS, STATUTE OF, 1.

General Issue.

Plea of *nul disseisin* in real action is assertion of possession under title, see REAL ACTION, 1.

Plea of *nul disseisin* in real action puts in issue only title, and equitable defence is not admissible under it, see REAL ACTION, 2.

Binding Effect of Pleadings.

2. The preparation and filing of pleadings are presumed to be within the scope of the employment of an attorney at law appearing for a party to

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an action, and the statement of a ground of defence in an answer or demurrer must be held to be binding on the defendant, at any rate until the attorney is shown to have acted without authority. *DeMontague* v. *Bacharach*, 128.

Objection on Pleadings must be made at Trial.

Objection on pleadings not pointed out in lower court cannot be made first on argument of exception to refusal to rule for excepting party, see PRACTICE, CIVIL, 30.

PLEADING, CRIMINAL.

Indictment.

Requisites of indictment for larceny by embezzlement under R. L. c. 208, § 26, see LARCENY, 1, 2.

Variance.

In an indictment for larceny by embezzlement an allegation that the money embezzled belonged to a person named is supported by proof that the person named was the master of a fishing vessel, of which the defendant was purser for the crew, and as master had a special property in the money within the meaning of R. L. c. 219, § 9, being accountable for it to the owner of the vessel and the crew. *Commonwealth* v. *McDonald*, 581.

PLEDGE.

1. A bank lending money on a note signed by a trustee as such and accepting as security a transfer of shares of stock belonging to the trust, if it has notice from the form of the stock certificate that the shares are held in trust, is put upon inquiry and takes the risk of the trustee having no authority to pledge the stock as collateral. *Tuttle* v. *First National Bank of Greenfield*, 533.
2. A bank which has lent money on the note of a trustee secured by a pledge of trust property after having notice of the trust, if it turns out that the instrument of trust gives the trustee no power to pledge the trust property, not only has no legal title to the property against the beneficiaries of the trust or a new trustee, but has no remedy in equity against the principal or income of the trust estate. *Ibid.*

Trustee with power to invest and change investments has no implied authority to pledge trust property for purposes of trust, see TRUST, 2.

Bona fide purchaser of note obtained by fraud takes also good title to mortgage and mortgage note delivered to him as security for it although the mortgage note may not be negotiable, see BILLS AND NOTES, 11.

POOR DEBTOR.

If a poor debtor, who is charged with fraud under R. L. c. 168, § 17, cl. 2, and who has entered into a recognizance for his appearance for examination, voluntarily makes default by failing to appear at the time and place appointed for the hearing, under §§ 52 and 55 of the same chapter he has

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forfeited the benefit of the proceedings under the provisions of the chapter, and there is a breach of his recognizance. *Radovsky* v. *Sperling*, 202.

POWER.

Power to sell real estate given by will to executor where it is attached to the office and not personal passes to administrator with will annexed, see EXECUTOR AND ADMINISTRATOR, 2.

Direction in will to executor to wind up estate and divide net proceeds held to create power coupled with a trust to sell real estate, and after paying debts and legacies to distribute proceeds, see DEVISE AND LEGACY, 1.

Devise to distribute principal on death of beneficiary for life to those who would be entitled to receive it were it given to the beneficiary for life absolutely held not to create power of appointment in him, see DEVISE AND LEGACY, 4.

PRACTICE, CIVIL.

Filing Petition with Selectmen of Town.

Sufficiency of certain filing of petition for damages with selectmen, see DAMAGES, 7.

Parties.

1. On a petition to enforce a mechanic's lien, where the original respondent as the owner of the real estate has filed a bond with sureties to dissolve the lien, and later has died intestate, and, the time for presenting claims against his estate having passed, his administrator has filed a final account by which it has appeared that there were no assets and has died, the proceeding being in the nature of a proceeding *in rem* and the liability on the bond representing the *res*, if the petitioner cannot procure the appointment of an administrator *de bonis non* of the estate of the original respondent, the principal on the bond, he may proceed against the sureties alone, the administrator, although a proper party, not being a necessary party to the proceeding. *Holmes* v. *Humphreys*, 513.

Defendants cannot be sued jointly where liability differs in character, see JOINT TORTFEASORS.

Agreed Statement of Facts.

2. Where a case is submitted on an agreed statement of facts with the power to draw inferences, a finding of the court below on a matter of fact is conclusive unless the facts agreed show it to be erroneous as a matter of law. *Bullock* v. *Haverhill & Boston Dispatch Co.* 91.
3. Upon an agreed statement of facts in which no power to draw inferences is given the judgment must be for the defendant unless the facts stated show a liability to the plaintiff as matter of law. *Boston* v. *Brooks*, 286.
4. The rule in regard to drawing no inferences on an agreed statement of facts unless the power to do so is given has no application to a statement of agreed facts submitted as evidence. *Souther* v. *Gloucester*, 552.
5. An erroneous ruling upon a question of law, made by a judge hearing a case upon an agreed statement of facts which gives no power to draw in-

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ferences of fact, if it is not material to the decision of the judge furnishes no ground for a reversal of the judgment. *Haverhill* v. *Marlborough*, 150.

6. A party aggrieved by a ruling of law, made by a judge upon an agreed statement of facts which gives no power to draw inferences of fact, has the right to allege exceptions under R. L. c. 173, § 106, but where such exceptions can present no questions which are not open on an appeal from a judgment on the agreed facts, the resort to exceptions is bad practice because wholly useless. *Ibid.*

Auditor's Report.

7. Where a rule to an auditor provides that his findings of fact shall be final, a motion to recommit his report is a proper method of raising questions as to the correctness of his rulings upon the admission or exclusion of evidence. If in such a case the trial judge refuses to recommit the report, and it appears that the questions of evidence were of such a nature as to have had an effect upon the auditor's findings, and the judge in refusing to recommit the report has given no reason for his refusal which shows it to have been made as a matter of discretion, this court will assume that the refusal was equivalent to a ruling that there was no error of the auditor in dealing with the questions of evidence, and will pass upon the correctness of that ruling. *Tripp* v. *Macomber*, 109.

Conduct of Trial.

8. It is not within the discretionary power of a presiding judge at a jury trial to exclude material evidence because he thinks that evidence already has been introduced sufficient, if believed, to establish the fact to be proved. *Perkins* v. *Rice*, 28.

General Verdict.

9. After a general verdict for the defendant in an action of tort, an exception of the plaintiff to the exclusion of evidence will be sustained if the rejected evidence was material on any of the issues submitted to the jury, as the verdict may have been rendered on the issue on which the evidence was offered. *Perkins* v. *Rice*, 28.

10. In an action for personal injuries by a workman against his employer, with counts both under the employers' liability act and at common law, if the plaintiff on the evidence is entitled to recover at common law as well as under the act, but the judge states that he shall submit the case to the jury only under the statute and in his charge does not specify how he leaves it to them and does not mention the limit of damages, under the practice which has grown up in this Commonwealth the defendant's counsel has the right to assume that the case is going to the jury only on the counts under the statute, and if the jury find generally for the plaintiff in a sum in excess of $4,000, the plaintiff can be made to relinquish his damages in excess of that sum or be compelled to try his case again, although the defendant in excepting to the ruling of the judge that the plaintiff was entitled to go to the jury under the employers' liability act did not ask the judge to order a verdict for the defendant on the common law counts, and although the plaintiff was entitled to go to the jury on all

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the counts and to recover at common law as well as under the statute. *Lynch* v. *M. T. Stevens & Sons Co.* 397.

Special Verdict.

11. If a presiding judge after the return of a verdict questions the jury as to the grounds on which the verdict was rendered the answers of the jury have the effect of special findings. *Ellis* v. *Block*, 408.

12. In an action of contract against the members of a firm on an alleged contract to employ the plaintiff for a certain purpose at a compensation named, the plaintiff testified to a conversation between himself and one of the defendants which the plaintiff contended constituted an oral contract. The defendant who took part in the conversation testified that it consisted of a proposition made by the plaintiff to which he returned an evasive answer. Certain letters written by the same defendant were introduced by the plaintiff which he contended made a binding contract if the oral conversation did not. The defendants contended that if the agreement was oral it was not to be performed within a year, so that the action was barred by the statute of frauds. The presiding judge instructed the jury that if the conversation was a mere proposition on the part of the plaintiff it was for the jury to say whether the defendants accepted the proposition by the letters. This was erroneous, as the letters were not susceptible of such a construction. The jury returned a verdict for the plaintiff, and in answer to a question by the judge stated that they had considered the statute of frauds and also the liability of the firm for the acts of the partner. The plaintiff contended that the special findings contained in this answer cured the error of law in the instruction of the judge in regard to the effect of the letters, as the questions of the statute of frauds and of ratification arose only in case the contract was an oral one made before the letters were written. *Held*, that the special findings in the answer of the jury did not cure the error, as the findings could not be extended beyond the statement that the statute of frauds and ratification had been considered, and did not show that the verdict might not be founded on an acceptance of an oral proposition by the letters. *Ibid.*

Decree.

13. If an order made by a single justice of this court affirming a decree of the Probate Court is entered as a decree while exceptions to rulings of the single justice are pending, this in legal effect is not a decree but only an order for a decree, and if the rescript sent down by the full court contains an order "Decree affirmed", this refers to the decree of the Probate Court which is the only one in existence in the case, and to complete the record a decree must be made by a single justice of this court affirming the decree of the Probate Court, and remanding the case to the Probate Court for further proceedings. *Tyndale* v. *Stanwood*, 531.

Petition to vacate Judgment.

14. It is error to grant a petition to vacate a judgment under R. L. c. 193, § 15, when the petitioner has not given the bond required by § 17 of that

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chapter, unless the case comes under the exception provided for by § 18. *Davis* v. *National Life Ins. Co.* 468.

Appeal.

Attorney general may authorize attorney to take appeal on behalf of Commonwealth, see ATTORNEY GENERAL.

New Trial.

15. Under Rule 31 of the Superior Court a judge of that court properly can hear a motion for a new trial on affidavits with or without oral testimony to support them. *Manning* v. *Boston Elevated Railway*, 496.

16. The decision of a trial judge in the proper exercise of his discretion on a motion for a new trial, that one of the jurors who returned the verdict was not of good moral character and was disqualified, and the granting of a new trial on this ground, are not subject to revision by this court. *Ibid.*

17. On a motion for a new trial on the ground that one of the jurors returning the verdict had been convicted of a scandalous crime and was not of good moral character and that this was unknown to the party making the motion or his attorney until after the verdict, if it appears that in a period of several years there were eight criminal cases against the juror in the Superior Court in most of which he had been convicted and sentenced to imprisonment, and that in a period of twenty-three years there had been twenty-eight criminal prosecutions against him in the municipal court of the city in which he lived, in all of which he had been convicted and in many of which he had been sentenced to imprisonment, and that the latest sentence was imposed less than thirteen months before the trial, it is a proper exercise of judicial discretion for the presiding judge to find that the juror is not of good moral character and is disqualified, and to grant a new trial on this ground. *Ibid.*

18. On a motion for a new trial on the ground of the disqualification of a juror, if the affidavits aver that the disqualification was unknown to the party making the motion or his attorney before the juror was called, sworn or served, it may be found by the presiding judge in his discretion that neither the moving party nor his attorney was at fault in not making an objection to the juror before the verdict without its being shown that either of them made inquiry or investigation in regard to the juror before the trial. *Ibid.*

19. On a motion by a street railway company, against which a verdict for personal injuries has been returned, for a new trial on the ground that one of the jurors rendering the verdict had been convicted of a scandalous crime and was not of good moral character, the facts, that this juror worked as a laborer upon the streets and in the yard of the railway company and that a witness in the case was at one time the foreman under whom he worked, do not show neglect on the part of the railway company or its attorney in failing to know the character of the juror before the trial. *Ibid.*

No exception lies to refusal to make ruling of law at hearing on motion for new trial on question raised at trial, see *post*, 29.

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As to new trial or relinquishment of damages in excess of $4,000 after general verdict, where judge stated that he should submit case to jury only under employers' liability act, but did not mention limit of damages in charge or order verdict for defendant on common law counts, see *ante*, 10.

Report.

20. Under R. L. c. 156, § 7, a single justice of this court can report to the full court the questions of law which arise upon the record before him without deciding the questions. *Attorney General* v. *Preferred Mercantile Co.* 516.

Exceptions.

21. The judge who presided at a trial properly may allow a defendant to amend his bill of exceptions although the time for filing exceptions has expired by adding to the statement that the judge refused to rule at the close of the plaintiff's evidence that the plaintiff could not recover a further statement that the judge again refused to make that ruling at the close of all the evidence, if it appears that this was what the defendant originally intended to state but that inadvertently he left the statement incomplete. *Dorr* v. *Schenck*, 542.

22. If a finding by a single justice of this court sitting without a jury expressly includes a ruling of law, first made when the decision is filed some time after the end of the trial, R. L. c. 173, § 106 requires a party who desires a revision of the ruling to reduce his exception to writing and file it with the clerk within twenty days after notice of the decision has been received, unless further time is allowed by the court, but this does not give the excepting party twenty days within which to allege his exception. On the contrary he must allege it promptly within a reasonable time after receiving notice of the ruling, and not to allege it until filing his bill of exceptions twenty days after the decision is unreasonable and in such a case the exception must be disallowed by the single justice as alleged too late. *Richards* v. *Appley*, 521.

23. The exclusion of material evidence is none the less a ground for exception because there was uncontradicted testimony which if believed was amply sufficient to establish the fact which the excluded evidence was offered to prove. *Perkins* v. *Rice*, 28.

24. Where no ruling has been asked for, and a finding has been made by a judge sitting without a jury, it is too late to except to the finding on the ground that it is not warranted by the evidence. *Richards* v. *Appley*, 521.

25. An excepting party, who has not excepted to the judge's charge, on the argument of exceptions to the refusal of his requests for instructions cannot complain of a sentence used by the judge in his charge. *McCabe* v. *Whitman*, 484.

26. No exception lies to the refusal of a request for a ruling founded on the assumption of a fact in dispute. *Murphy* v. *Commonwealth*, 361.

27. No exception lies to the exclusion of a question where it does not appear what answer the witness was expected to make. *Bachant* v. *Boston & Maine Railroad*, 392.

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28. The admission of incompetent evidence which did no harm to the excepting party is not a ground for exception. *Scaplen* v. *Blanchard*, 73.

29. No exception lies to the refusal at the hearing of a motion for a new trial to make a ruling of law upon a question raised at the trial. *Murphy* v. *Commonwealth*, 361.

30. On the argument of an exception to a refusal to rule that the plaintiff is not entitled to recover in an action under the employers' liability act, the defendant cannot raise the point that the count on which the case was tried set forth no cause of action under the act, if this point was not raised in the court below either by demurrer or by asking for a ruling on the pleadings, and the case was tried on the assumption that the count properly alleged the negligence of a superintendent of the defendant within the terms of the act. *Greenstein* v. *Chick*, 157.

Exceptions to ruling of law upon agreed statement of facts are allowable but bad practice where same questions open on appeal, see *ante*, 6.

Erroneous ruling on question of law upon agreed statement of facts if not material to decision is not ground for reversal of judgment, see *ante*, 5.

Taxation of Costs.

31. Where but one judgment is rendered in an action, the prevailing party entitled to costs under R. L. c. 203, § 1, is he for whom the judgment has been given, although in the course of the proceedings he has made certain claims on which he is not allowed to recover and as to which the other party has prevailed. This applies to the taxation of costs for the transmission of papers to this court under R. L. c. 157, § 21. The words "prevailing party" in the last named section have the same meaning as in the statute first named, and do not mean the party in whose favor the questions before this court have been decided unless he also is the party in whose favor the judgment has been entered in the action. *Smith* v. *Wenz*, 421.

32. If while an appeal from a taxation of costs by the clerk is pending the attaching officer is allowed to amend his return, *semble* that it is proper for the court to send the case back to the clerk to give him an opportunity to change his taxation on the record as amended, so that an appeal may bring the whole record before the court. *Ibid.*

PRACTICE, CRIMINAL.

Exceptions.

1. Where a criminal case coming before this court on the defendant's exceptions is submitted on briefs an exception not mentioned in the defendant's brief is considered waived. *Commonwealth* v. *Clancy*, 191.

2. An exception by a defendant in a criminal case cannot be sustained to an instruction of the presiding judge, which properly interpreted is correct, on the ground that it might have been misunderstood by the jury, if the defendant did not call the judge's attention to the matter at the trial and ask him to make the instruction more plain. *Commonwealth* v. *Middleby*, 342.

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Revision of Sentence.

3. When the sentence in a criminal case is stayed under R. L. c. 220, § 3, to await a decision upon exceptions, the overruling of the exceptions does not end the case, which remains in court for further action to enforce the sentence, and when the case comes up for such action the trial court has power to revise its sentence, although such a revision should not be granted except for the purpose of correcting a manifest error of law or fact. *Commonwealth* v. *Lobel*, 288.

Order for Restoration of Stolen Property.

4. Where, after a defendant has been found guilty of larceny of money and sentence has been imposed, the judge makes an order that the money in the possession of the defendant at the time of his arrest be restored to the owner as required by R. L. c. 208, § 39, the finding of the judge on the question of fact whether the money was a part of that wrongfully taken by the defendant is conclusive. *Commonwealth* v. *McDonald*, 581.

Disposition of Bail Deposit after Sentence.

See RECOGNIZANCE, 1–3.

PROBATE COURT.

Decree of Probate Court within its jurisdiction cannot be attacked collaterally, see JUDGMENT, 1.

Sale under decree of Probate Court valid so long as decree remains unrevoked, see PARTITION, 2.

PROXIMATE CAUSE.

Liability of city operating ferryboat as carrier for accident to which negligence of third person contributed, see MUNICIPAL CORPORATIONS, 10.

Negligence of superintendent in ordering gang of men to lift heavy, small machine is proximate cause of injury to workman who was jostled by other workmen and injured by closing of knife edges in machine, see NEGLIGENCE, 35.

PUBLIC HEALTH.

Municipality cannot recover under R. L. c. 75, § 57, expenses incurred in preservation of public health in enforcing smallpox quarantine or for supplies for persons not ill quarantined in same house with smallpox patients, see MUNICIPAL CORPORATIONS, 20.

PUBLIC OFFICERS.

St. 1904, c. 314, § 1, as to removal of public officers, does not extend term of police officer employed for period fixed by city charter, see CIVIL SERVICE LAW.

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PUBLIC SHOWS.

Boxing match given by club to which only alleged members are admitted if machinery of club is mere sham may be found to be public within R. L. c. 207, § 12, see BOXING MATCH.

QUO WARRANTO.

The answer of a corporation to an information by the attorney general in the nature of a *quo warranto*, requiring it to show by what authority it is conducting the business in which it is engaged, is not necessarily to be taken as true. *Attorney General* v. *Preferred Mercantile Co.* 516.

Information by attorney general in nature of *quo warranto* is proper proceeding to enforce forfeiture of charter of domestic corporation issuing obligations redeemable in numerical or arbitrary order, see INFORMATION.

RAILROAD.

Liability under R. L. c. 111, § 268.

In an action against a railroad company under R. L. c. 111, § 268, for the loss of life of the plaintiff's intestate at a grade crossing of a highway, alleged to have been caused by the defendant's failure to give the signals required by § 188 of the same chapter, there was evidence, that the plaintiff's intestate, being awake and sober, was driving a quiet horse late at night in a covered wagon carrying bottles which rattled, that when near the crossing he shouted "whoa" to his horse, that there was no bell or whistle to warn him, that his view of the track was obstructed by freight cars, that it was somewhat foggy, that the gates seemingly intended to warn travellers of approaching trains were up, and that while thus crossing the track a train of the defendant decapitated his horse, broke his wagon and instantly killed him. *Held*, that the case properly was submitted to the jury on the questions, whether the signals required by law were given, whether their absence contributed to the collision, and whether the defendant had proved gross negligence on the part of the plaintiff's intestate. *Brusseau* v. *New York, New Haven, & Hartford Railroad*, 84.

After land of railroad has become public highway by prescription abutter cannot acquire private right of way by adverse use, see WAY, 1.

Railroad company summoned as trustee by trustee process not chargeable with money due defendant railroad company as agent and trustee of other railroads, see TRUSTEE PROCESS, 2.

Money due to railroad company as lessee operating a railroad of another company under covenants of lease reached by trustee process, see TRUSTEE PROCESS, 3.

Cars of railroad leased to defendant under certain covenants not reached by trustee process, see TRUSTEE PROCESS, 4.

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Railroad (*continued*).

No right, under Vermont statute, to attach rolling stock leased to but never owned by defendant railroad company, see TRUSTEE PROCESS, 5.

R. L. c. 167, § 39, as to attachment of railroad rolling stock, applies to attachment by trustee process, see ATTACHMENT, 7.

Railroad company not chargeable by trustee process with freight car in its possession in another State, see TRUSTEE PROCESS, 6.

For negligence on railroad, see NEGLIGENCE, 5–14.

REAL ACTION.

1. The plea of *nul disseisin* in a real action is an assertion of possession under title. *Murphy* v. *Commonwealth*, 361.
2. A plea of *nul disseisin* in a real action puts in issue only the title, and under it the tenant cannot introduce evidence tending to show a right to have a contract in writing for the sale of the land to him reformed and to have specific performance of the reformed contract. *Hastings* v. *Lawson*, 72.
3. In a real action a tenant can introduce evidence of facts which would entitle him to relief in equity against the demandant's claim only when he has alleged such facts as an equitable defence under R. L. c. 173, § 28. *Ibid.*

REAL PROPERTY.

Ice house built by lessee may be personal property but if built by owner of land is real estate, see FIXTURES.

Rails of street railway company laid on public street remain personal property, see STREET RAILWAY, 2.

RECOGNIZANCE.

Bail Deposit.

1. A person making a deposit of bail money, in order that another person arrested on criminal process may be allowed to give his personal recognizance under R. L. c. 217, § 77, retains the general ownership in the money subject to the pledge under the statute, and the prisoner, after having been indicted and sentenced without making default on his recognizance, cannot make an assignment of the bail money which will be good against the depositor who owns it, however the title to the money may be regarded as between the Commonwealth and the prisoner. *Way* v. *Day*, 476.
2. Whether a court of equity can interfere with the disposition of bail money deposited in order that a person arrested on criminal process may be allowed to give his personal recognizance under R. L. c 217, § 77, which by § 79 of the same chapter and St. 1908, c. 236, is subject to the order of the court in which the money is deposited, *quære*. *Ibid.*
3. Whether a court in which bail money is deposited under R. L. c. 217, § 77, to enable a person arrested on criminal process to give his personal recognizance, after the prisoner has been sentenced without making default on his recognizance can order the money to be paid to any person

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other than the prisoner "or his order" as directed by R. L. c. 217, § 79, St. 1903, c. 236, *quære*. *Way* v. *Day*, 476.

RELIGIOUS SOCIETY.

Corporate Powers.

1. It is within the power of a religious society organized under our statutes to devote its general funds to the aid of other churches or religious societies or to home or foreign missions. Thus it is within the general scope of the corporate powers of a Roman Catholic church organized under Pub. Sts. c. 38, § 48, (R. L. c. 36, § 44,) to transfer a part of its funds to a new parish set off from itself. *Enos* v. *Church of St. John the Baptist*, 40.

Powers of Trustees.

2. The trustees of a Roman Catholic church organized under Pub. Sts. c. 38, §§ 48–50 (R. L. c. 36, §§ 44–46) have complete control of the corporate doings, and no other communicant or member of the corporation or of the parish can take part in the corporate action. *Enos* v. *Church of St. John the Baptist*, 40.

R. L. c. 102, § 70, as to stable near church, may apply where stable and church are on different streets but does not apply to stable let in specified parts to tenants who care for their own horses, see STABLE.

RULES OF COURT.

Under Rule 31 of Superior Court judge may hear motion for new trial on affidavits with or without oral testimony, see PRACTICE, CIVIL, 15.

SALE.

Conditional.

1. A contract made in advance by a purchaser under a contract of conditional sale to waive his right to a demand in writing and an itemized account and his rights in regard to redemption and sale given by R. L. c. 198, § 13, is void as against public policy. *Desseau* v. *Holmes*, 486.
2. One who sells trucks and motors to a street railway company under a contract of conditional sale, retaining the title until paid the price in full, has a good title against a purchaser of the property of the railway company at a foreclosure sale under a mortgage, although neither the mortgagee nor the purchaser had notice of the existence of the contract of conditional sale. *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway*, 500.
3. St. 1894, c. 326, (R. L. c. 111, § 75,) requiring the recording of conditional sales of "street railway rolling stock" in the office of the secretary of the Commonwealth, and that each engine or car shall be marked with the name of the vendor, does not apply to conditional sales of separate parts of cars, and one who sells trucks and motors to a street railway company, retaining the title until paid the price in full, so long as he remains

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unpaid has a good title against a purchaser of the property of the railway company at a foreclosure sale, although neither the mortgagee nor the purchaser had notice of the existence of the contract of conditional sale. *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway*, 500.

In action by seller under contract of conditional sale against buyer for conversion of chattels so sold, part payments are not to be deducted in reduction of damages from value of property at time of conversion, see CONVERSION, 2.

SCHOOL.

R. L. c. 112, § 72, requiring street railway companies to carry pupils of public schools for half fare is constitutional, see CONSTITUTIONAL LAW, 6.

SIGNATURE.

Sufficiency of signature to notice to employer of injury to employee written by attorney's stenographer, see EMPLOYERS' LIABILITY ACT.

SNOW AND ICE.

For cross references, see ICE AND SNOW.

SOUTH TERMINAL STATION.

Construction of Summer and Cove Streets in Boston under St. 1896, c. 516, not governed by St. 1891, c. 323, see TAX, 1.

Authorization of assessment for betterments by § 14 of St. 1896, c. 516, constitutional, see CONSTITUTIONAL LAW, 5.

SPARRING EXHIBITION.

See BOXING MATCH.

STABLE.

The provision of R. L. c. 102, § 70, that "No person shall, in a city, occupy or use a building for a livery stable or a stable for taking or keeping horses and carriages for hire or to let within two hundred feet of a church or meeting house erected and used for the public worship of God without the consent in writing of the religious society or parish worshipping therein," does not apply to a stable which is let out in specified parts to tenants who take care of their own horses. *Semble*, that the prohibition of the statute extends to a case where the back of a stable of the kind described in the statute is within two hundred feet of the back of a church although the buildings face on different streets. *Congregation Beth Israel* v. *O'Connell*, 236.

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STATUTE.

Construction.

1. A statute is not to be construed as retroactive unless an intention that it should affect past transactions is expressed in its provisions. *Haverhill* v. *Marlborough*, 150.
2. The use of a word in the title of a statute cannot be held to control or enlarge the words of the statute unless they are of doubtful meaning or ambiguous. *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway*, 500.
3. When separate statutes concerning the same general subject are brought together by codification, if they previously have received judicial construction and are re-enacted without substantial change, it will be presumed that the Legislature adopted the construction given by the court. *Shelton* v. *Sears*, 455.

R. L. c. 102, § 70, as to stable near church, may apply where stable and church are on different streets, but does not apply to stable let in specified parts to tenants who care for their own horses, see STABLE.

Repeal.

St. 1869, c. 61, relating to Haverhill police force, repealed by St. 1894, c. 480, covering whole subject of police department of that city, see HAVERHILL.

St. 1902, c. 213, relating to compensation of city or town for expenses incurred for persons infected with smallpox, repealing R. L. c. 75, § 57, did not affect obligations existing under repealed section, see MUNICIPAL CORPORATIONS, 17.

Statutory Remedy exclusive.

Remedy of property owner damaged by trestle constructed under St. 1903, c. 163, is that given by the statute and is not by bill in equity, see CONSTITUTIONAL LAW, 8.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 709.

STREET RAILWAY.

1. A street railway company may purchase shares of its own stock. The prohibition contained in R. L. c. 112, § 26, relates to the stock of other railway companies. *Leonard* v. *Draper*, 536.
2. The rails of a street railway company laid in a public street remain personal property, such a company having no interest in the soil of the street

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of which the rails on annexation can become a part. *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway*, 500.

As to title to trucks and motors sold to street railway company under contract of conditional sale and purchased at foreclosure sale of property of street railway company, see SALE, 2.

R. L. c. 111, § 75, as to conditional sales of street railway rolling stock does not apply to sales of parts of cars, see SALE, 3.

Constitutionality and construction of St. 1903, c. 163, as to certain trestle in highway and compensation to property owners damaged, see CONSTITUTIONAL LAW, 8.

In computing for purpose of excise tax gross receipts per mile of track of street railway company, tracks operated on private land should be included, see TAX, 5.

As to negligence on street railway, see NEGLIGENCE, 15–21.

SUBROGATION.

Third mortgagee paying first mortgage subrogated to rights of first mortgagee as to land and claim for damages to it, see EQUITY JURISDICTION, 17.

SUPERIOR COURT.

Revision of sentence which has been stayed under R. L. c. 220, § 3, while awaiting decision of this court on exceptions, see PRACTICE, CRIMINAL, 3.

Under Rule 31 of Superior Court judge may hear motion for new trial on affidavits with or without oral testimony, see PRACTICE, CIVIL, 15.

SUPREME JUDICIAL COURT.

Under R. L. c. 156, § 7, single justice can report to full court questions of law arising on record before him without deciding the questions, see PRACTICE, CIVIL, 20.

TAX.

Assessments.

1. St. 1896, c. 516, providing for the construction and maintenance of the south terminal station in Boston, which required the construction of Summer Street and Cove Street as described in § 11 of that statute, did not require such construction to be in accordance with the provisions of the board of survey act, St. 1891, c. 323, as amended by St. 1892, c. 418, imposing the provisions of St. 1890, c. 418, §§ 4–6, and an assessment for betterments on account of the location and construction of the two streets named is valid although the methods prescribed by the earlier statutes were not followed. *Wells* v. *Street Commissioners*, 451.

Authorization of assessment for betterments by § 14 of St. 1896, c. 516, for the construction of Summer and Cove Streets in Boston in connection with the construction and maintenance of the south terminal station constitutional, see CONSTITUTIONAL LAW, 5.

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Re-assessment of betterment tax may be authorized if original assessment was defective, see CONSTITUTIONAL LAW, 1.

Betterments may be assessed after as well as before expenditure incurred, see CONSTITUTIONAL LAW, 2.

St. 1902, c. 527, authorizing certain assessments for betterments is constitutional and applies to assessments for expenditures illegal when incurred, see CONSTITUTIONAL LAW, 3.

St. 1902, c. 527, authorizing re-assessment for certain betterments, is not unconstitutional on ground that it exempts from such assessment owners who paid original invalid assessment, see CONSTITUTIONAL LAW, 4.

In Cambridge assessment for betterments from widening street must be made within two years of approval of original order by mayor, see MUNICIPAL CORPORATIONS, 1.

Domicil.

2. One owning a house in a city and another in a town by the sea, can change his residence from the city to the town by forming an intention while abiding at his house by the sea of making it his permanent home for an indefinite period, if in pursuance of that purpose he continues to use it as his home, and this change of residence is none the less effected because the intention of the house owner is formed in the autumn and in the following winter he occupies his house in the city and in the spring goes abroad and does not return to his house at the seashore until June, his family having moved there after the first of May. *Barron* v. *Boston*, 168.

Sale.

Redemption.

3. A bill in equity to redeem land from a tax sale within five years may be maintained under R. L. c. 13, § 75, if it appears that the plaintiff acted in the erroneous belief that the taxes on his property were being paid as they came due from the rent of a certain store and was ignorant of the advertisement of the property for sale and of the sale itself. *O'Callaghan* v. *Lancy*, 474.

On Goods employed in Manufacturing.

4. "Goods, wares, merchandise and other stock in trade . . . employed in the business of manufacturing or of the mechanic arts" which, under the first exception of R. L. c. 12, § 23, are taxable to the owners thereof in the cities or towns in which they "hire or occupy manufactories, stores, shops or wharves," do not include a printing press and other personal property used in publishing a bulletin of information to bankers every five minutes during business hours, containing information which ceases to be of value as soon as it becomes matter of common knowledge, such a business not being manufacturing nor the place where it is carried on a manufactory within the meaning of a statute, even if the property used in the publishing properly can be called goods, wares or merchandise. *Barron* v. *Boston*, 168.

Excise on Street Railway Companies.

5. In computing the annual gross receipts for each mile of track of a street railway company for the purpose of determining the rate at which an

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Tax (*continued*).

excise tax should be assessed under R. L. c. 14, § 44, the assessors must include all tracks operated by the railway company on private lands outside the limits of any public highway as well as those on public ways. *Greenfield & Turners Falls Street Railway* v. *Greenfield*, 352.

Water Rates.

Reasonableness of higher water rate in outlying section of city, see MUNICIPAL CORPORATIONS, 16.

TRUST.

Creation.

No trust created by attempted cutting down of absolute devise in fee, see DEVISE AND LEGACY, 3.

Direction in will to wind up estate and divide net proceeds held to create power coupled with trust in administrator with will annexed to sell property and after paying debts and legacies to distribute proceeds, see DEVISE AND LEGACY, 1.

Termination.

1. A testator directed that certain municipal and railroad bonds named, if owned by him at the time of his death, should be set apart by his executor to provide for the payment of a certain income to each of two nieces named so far as necessary for that purpose, and that all the other bonds which he should own at the time of his death should be held by a certain trust company, as trustee, until the death of the two nieces above referred to, that the interest therefrom should be paid to his executor for distribution to the persons entitled to receive it under his will, and that on the death of both of the nieces, the bonds might be sold and distributed with all accumulations to the persons entitled to the residue of his personal estate. While the nieces still were living, three out of four of the persons entitled to the residue of the testator's personal estate, all being of age, filed a bill in equity praying for the termination of the trust. The fourth beneficiary and the trustee opposed the termination of the trust before the death of the nieces. *Held*, that, even if this court ever would terminate such a trust against the objection of one of the beneficiaries, there was no reason for doing so in this case, it being plainly the intention of the testator that the trust should continue until the death of both of his nieces, the provision to that end being lawful, and nothing having happened which the testator did not anticipate. *Hoffman* v. *New England Trust Co.* 205.

Executor as Trustee.

Executors charged with trust as to management of property take as trustees although word "trustee" not used, see EXECUTOR AND ADMINISTRATOR, 3.

Powers of Trustee.

2. A trustee with power to invest the trust property "according to his best judgment and discretion" and to pay the income to beneficiaries, with "full power to change any investment at his discretion," has no authority,

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unless it is expressly given by the terms of the trust, to pledge any part of the trust property to secure a promissory note signed by him as trustee, although the money lent upon the note goes into the trust fund and is expended for purposes for which the income of the trust lawfully could be expended. *Tuttle* v. *First National Bank of Greenfield*, 533.

Rights of Beneficiary against Third Person.

Rights of beneficiary against supposed pledgee in trust property pledged without authority by trustee to secure loan to trust estate, see PLEDGE, 1, 2.

Liability of Trustee to Third Person.

3. If a trustee signs a promissory note as trustee without authority to do so the note is binding upon him personally. *Tuttle* v. *First National Bank of Greenfield*, 533.

Charitable.

Gift by will of fund to trustees to accumulate for twenty-five years for hospital for sick persons in indigent circumstances not affected by rule against perpetuities, see CHARITY, 1.

Where impossible to administer charitable trust through formation of corporation as provided for by will, court will administer it *cy pres*, see CHARITY, 2.

Powers of Roman Catholic church organized under R. L. c. 86, §§ 44–46, and of trustees of such church, see RELIGIOUS SOCIETY, 1, 2.

TRUSTEE PROCESS.

1. Statements made upon information and belief in the answer of one summoned as trustee by trustee process in the absence of anything in the record to control them must be taken as true. *Cox* v. *Central Vermont Railroad*, 596.

2. In an action against a railroad company another railroad company cannot be charged by trustee process for money credited to the defendant on account of the earnings of railroads beyond the defendant's lines which the defendant would take only as the agent and trustee of the companies operating those railroads. *Ibid.*

3. In an action against a railroad company another railroad company can be charged by trustee process for money due to the defendant on account of the earnings of a railroad leased to the defendant by an instrument under which the defendant is to conduct the business of the leased road as a proprietor and not as a trustee, its possession and control being that of a lessee bound by the covenants of the instrument. *Ibid.*

4. In an action against a railroad company another railroad company cannot be charged by trustee process for cars in its possession mortgaged by their owner and lessor to which the defendant's only title is that of a lessee for ninety-nine years under an instrument containing among other covenants one to keep the cars in good condition and to replace them with other like property when worn out, and a covenant giving the lessor the

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right at any time, after a short notice, to enter and take possession of the property and terminate the lease in case of a breach of covenant by the lessee. *Cox* v. *Central Vermont Railroad*, 596.

5. Sections 3300, 3353 and 3443 of R. L. of Vermont, 1880, give no right to attach by trustee process or otherwise rolling stock leased to a defendant railroad company but which t never has owned. *Ibid.*

6. In an action against a railroad company another railroad company cannot be charged by trustee process for a freight car in its possession on a side track in another State. *Ibid.*

R. L. c. 167, § 39, as to attachment of railroad rolling stock applies to attachment by trustee process, see ATTACHMENT, 7.

WAGERING CONTRACTS.

1. To prove that a contract is void at common law as a wagering contract it is necessary to show that both parties expressly or impliedly understood and agreed to the things which made the contract a wager. *Farnum* v. *Whitman*, 381.

2. In an action for a balance alleged to be due on purchases of wheat made by the plaintiff on orders from the defendant, in which the defence is that the transaction was a wagering contract, the plaintiff may be allowed to testify, in rebuttal of testimony of the defendant, that there was no agreement between the plaintiff and the defendant that the contract should be settled by the payment of differences. *Ibid.*

3. In an action for a balance alleged to be due on purchases of wheat made by the plaintiff on orders from the defendant, in which the defence was that the transaction was a wagering contract, the plaintiff testified that he purchased the wheat in Chicago through his agent and tendered to the defendant warehouse receipts representing the wheat which the defendant refused to receive, and further testified that he was a member of the Chicago board of trade at the time of the transaction. He then against the defendant's objection was permitted to testify that in the Chicago board of trade deliveries of wheat were made by means of warehouse receipts and that the grain represented by them remained in the warehouse until delivered for shipment. No question was made that the receipts were sufficient evidence of the ownership of the number of bushels of wheat which they purported to represent. *Held*, that the evidence as to the method of delivery of wheat in the Chicago board of trade was competent on the question of the plaintiff's readiness and willingness to perform the contract, and was not made incompetent by the admission that the receipts were sufficient evidence of ownership. *Ibid.*

WAIVER.

Of exception in criminal case by failure to mention it in brief, see PRACTICE, CRIMINAL, 1.

Of statute of frauds by failure to plead it or rely upon it at trial, see FRAUDS, STATUTE OF, 1.

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Company insuring against liability, by defending action for insured, may waive defence that case is not covered by policy, but does not waive condition precedent imposed by policy that insured must pay judgment before insurance company is liable, see INSURANCE, 5.

WATER RATES.

Reasonableness of higher water rate in outlying section of city, see MUNICIPAL CORPORATIONS, 16.

WAY.

By Prescription.

1. After land of a railroad company has become a public highway by prescription an owner of adjoining land cannot acquire a private right of way by adverse use in travelling over it. *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 45.

By Exception or Reservation.

Exception in covenant against incumbrances of right of way over land conveyed modifies only the covenant and not the grant, see DEED, 4.

Unrecorded Grant.

Unrecorded instrument establishing right of way is binding upon subsequent owners of servient land having notice of its existence, see DEED, 8.

Public Use of Private Way.

2. In the absence of evidence to the contrary the use of a private way by the public is presumed to be permissive. *Weldon* v. *Prescott*, 415.

Liability of Proprietor of Private Way.

Proprietor of private way not liable for want of ordinary care causing mere licensee to fall into hole in way filled with hot water, see LICENSE.

Laying out of Highway.

3. Where the records of a city show that a report of the mayor and aldermen, that the common convenience and necessity require the laying out of a certain street, was accepted and approved by the board of aldermen, and that the report then was accepted by the common council, and that the board of aldermen concurred with the council in accepting the report, this shows a laying out of the street in accordance with law. *Baker* v. *Fall River*, 53.

Construction of Highway.

Quære, whether appropriation for "construction of streets" includes payment for land taken, see MUNICIPAL CORPORATIONS, 3.

Repairs of Highway.

4. The grant of a location to a street railway company by the selectmen of a town required the grade of the portions of a certain street between the tracks and eighteen inches outside of the tracks to be raised, and this was done, in accordance with plans drawn by the town engineers by direction

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of the selectmen and under the direction of the superintendent of streets, raising the level of this part of the street about twenty-two inches above the level previously existing. There was no record that the grade of the street had been established legally at any time or that the previously existing grade had been changed. The superintendent of streets caused the street to be graded to the same height between the location of the railway and the land of the abutters. On the petition of an abutter against the town for damages from the change of grade, it was *held*, that the grading of the street between the location of the railway and the petitioner's land was done in the way of ordinary repairs, in regard to which the superintendent of streets was the agent of the town, and that the petition could be maintained. *Garvey* v. *Revere*, 545.

Defect in Highway.

5. Cobble stones six inches in height supporting the edge of a concrete sidewalk, their upper surfaces being even with the line of the concrete walk, cannot be found to be a defect in the highway because a foot traveller coming upon the concrete walk from an intersecting street without a sidewalk has to step up six inches in the manner of stepping upon an ordinary curbstone. *Burke* v. *Haverhill*, 65.
6. A circular hole in the surface of a sidewalk from two to two and five eighths inches in diameter caused by the absence of one of the glass disks of a Hyatt light set in the sidewalk can be found to be a defect in the highway. Whether a hole so small that it could endanger no travellers except those using crutches could be found to be a defect in a highway, *quære*. *Upham* v. *Boston*, 220.
7. In an action for injuries incurred in midwinter from an alleged defect in a highway, the judge gave an instruction quoted from the charge to the jury in Bailey *v.* Cambridge, 174 Mass. 188, as follows: "You must find, in order to entitle the plaintiff to recover, and you must find it by a fair preponderance of the evidence on the part of the plaintiff, that it was not reasonably safe and convenient for public travel, independently of the ice and snow that was upon it." *Held*, that this gave in substance a ruling which had been requested by the defendant, the court making no comment on the correctness of the proposition stated. *McCabe* v. *Whitman*, 484.
8. *Semble*, that an automobile is a carriage within the meaning of the highway act, R. L. c. 51, § 1. *Baker* v. *Fall River*, 53.
9. A person is not precluded from recovering under the highway act, R. L. c. 51, for injuries from a defect in a highway dangerous to travellers in ordinary vehicles because when injured he was travelling in an automobile. *Ibid.*
10. In an action against a city for injuries from an alleged defect in a highway, consisting of a rope stretched across from a stake at the side of a sewer trench in the middle of the street to a telegraph pole in the sidewalk, on the right hand side as the plaintiff was approaching in an automobile and at the farther end of the trench from the plaintiff, the defendant contended that the plaintiff was negligent in choosing the narrower open-

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ing to the right rather than the wider one at the left. There was no other vehicle in the immediate vicinity at the time. The judge instructed the jury that in considering the question of the plaintiff's due care they might have in mind the provisions of R. L. c. 54, § 1, commonly known as the law of the road. *Held*, that this instruction was right; that, although there was no other vehicle in sight and the plaintiff might have turned to the left without disobeying the statute, it was plain that other vehicles might approach and if so it would be the plaintiff's duty to keep to the right of the trench, and that the requirement of the statute was material, both upon the question of the plaintiff's due care in attempting to travel where he did, and upon the question whether there was a defect caused by negligence in obstructing one entire half of the travelled path. *Baker* v. *Fall River*, 53.

11. In an action against a city for injuries from an alleged defect in a highway, consisting of a rope stretched across from a stake at the side of a sewer trench in the middle of the street to a telegraph pole in the sidewalk on the right hand side as the plaintiff was approaching in an automobile and at the farther end of the trench from the plaintiff, it appeared, that the plaintiff in attempting to pass to the right of the trench was struck by the rope, which he did not see until within two or three feet of it, and that he then tried to stop the machine and its speed was diminished when he struck the rope, that the rope was of a color not easily distinguishable and that no flag or other means of attracting attention to the presence of the rope was used. There was evidence that the plaintiff was proceeding slowly and carefully. *Held*, that on this evidence, with other evidence tending to show how long the obstructions had been in place and their nature and location, the questions whether there was a defect in the highway and whether the plaintiff was in the exercise of due care were for the jury. *Ibid.*

Notice of Defect.

12. Under Pub. Sts. c. 52, § 18, (R. L. c. 51, § 18,) it is a question of fact for the jury whether a city had, or by the exercise of proper care and diligence might have had, reasonable notice of a defect in a highway consisting of the depression of a sidewalk below the curbstone of nearly or quite two inches, if it appears that the street was a much travelled one and that the inner side of the curbstone above the depression was pretty nearly black, and stained, old looking and dirty. *Comerford* v. *Boston*, 564.

WIDOW.

Necessity of filing claim for dower under Pub. Sts. c. 127, § 18, where husband has died testate making no provision for widow, see DOWER.

WILL.

Execution and Attestation.

1. If a man, having signed an instrument purporting to be his will leaving all his property to a certain woman, and having acknowledged it as his

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Will (*continued*).

will before one attesting witness intending not to complete the instrument or to make it a valid will but merely to use it to induce the woman named as legatee to sleep with him, afterwards decides to make the instrument a valid will and with such intention acknowledges it as his will before two other witnesses who attest it as such, the instrument cannot be allowed as a will, as it has been acknowledged before and attested by only two witnesses when the attempting testator had the intention of making it his will. *Fleming* v. *Morrison*, 120.

2. The statements in an instrument purporting to be a will, that it was executed by the person named as testator as his will and was declared by him to be such in the presence of three witnesses whose names are subscribed, can be contradicted by oral testimony showing that the person named as testator, when he signed the instrument in the presence of one of the three witnesses and when that witness signed, did not intend to make the instrument a valid will by acknowledging it before two other witnesses and having it attested by them. *Ibid.*

WITNESS.

Cross-examination.

In the cross-examination of a party to an action, if he has been asked whether he did not make certain statements in his testimony in another action brought against him, and if the cross-examining counsel has read to the witness statements made by him at the trial of the other action and has stated that he is reading from an official stenographic report, the presiding judge may refuse to allow the counsel to state what the report is or the name of the case in which it was made, and may refuse to allow him to ask the witness whether the facts in the two cases are not identical, it being immaterial in what case the statements were made or whether the cases are identical, if the jury understand that the statements were made under oath and related to an issue involved in the case on trial. *Farnum* v. *Whitman*, 381.

At the trial of a complaint for assault and battery where one of the defendants has testified that he took no part in the assault the presiding judge in his discretion may permit the government to ask this defendant on cross-examination whether he did not approve of the assault, for the purpose of impeaching his credibility as a witness, see ASSAULT AND BATTERY, 2.

On the issue of the title to land claimed by a town under adverse possession the claimant against the town may be asked on cross-examination whether he ever paid any taxes on the land or knew of any taxes being paid by his ancestor, see ADVERSE POSSESSION, 8.

Expert.

Qualifications of expert witness as to reasonableness of charge for medical attendance, see EVIDENCE, 11.

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WORCESTER.

Under the revised charter of the city of Worcester, St. 1893, c. 444, § 40, the street commissioner has general authority in the management of his department to make contracts not to exceed a certain amount and above that amount can make such contracts when approved by the mayor. Therefore, after the passage of an order by the city council requiring the street commissioner under the direction of the mayor to construct a three arch masonry bridge at the causeway crossing Lake Quinsigamond, and after the necessary appropriation has been made, the street commissioner in conjunction with the mayor has power to make a contract for the construction of the bridge. *Webb Granite & Construction Co.* v. *Worcester*, 385.

Under charter, St. 1893, c. 444, § 29, damages awarded under lay out of new streets for land of which possession has not been taken are not "unpaid liabilities," see MUNICIPAL CORPORATIONS, 9.

WORDS.

"At wholesale." See *Commonwealth* v. *Poulin*, 568, 569.

"Debt." See *Woodbury* v. *Sparrell Print*, 426, 428.

"Defend." See *Connolly* v. *Bolster*, 266, 269.

"Draw." See *Menage* v. *Rosenthal*, 470, 474.

"Drive." See *Commonwealth* v. *Crowninshield*, 221, 226.

"Gross negligence." See *Evensen* v. *Lexington & Boston Street Railway*, 77, 79.

"Heirs at law." See *Merrill* v. *Preston*, 197, 198.

"Manufactory." See *Barron* v. *Boston*, 168, 171, 172.

"Manufacturing." See *Barron* v. *Boston*, 168, 171.

"Prevailing party." See *Smith* v. *Wenz*, 421, 425.

"Rolling stock." See *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway*, 500, 504, 505.

"Settle." See *Connolly* v. *Bolster*, 266, 271.

"Shall." See *Lawrence* v. *Methuen*, 592, 595.

"Use." See *Roberts* v. *Lynn Ice Co.* 402, 407.

"Use and benefit." See *Roberts* v. *Lynn Ice Co.* 402, 407.

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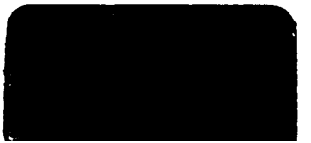

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